2004

Clayson v. Union Pacific Railroad : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHAYNE M. CLAYSON, Plaintiff/Appellant, vs. UNION PACIFIC RAILROAD COMPANY AND UTAH RAILWAY COMPANY, Defendants/Appellees.	)	Case No. 20040783-CA

On Appeal from the Third Judicial Court of
Salt Lake County, State of Utah
Judge Joseph C. Fratto

BRIEF OF DEFENDANTS/APPELLEES, UNION PACIFIC RAILROAD COMPANY AND UTAH RAILWAY COMPANY

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PARTIES

The names of all parties to the proceeding before the trial court are included in the caption, and no separate list is required to comply with Rule 24(a)(1) of the Utah Rules of Appellate Procedure.

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JURISDICTIONAL STATEMENT

Jurisdiction in the Utah Court of Appeals is appropriate pursuant to Utah Code Ann. § 78-2a-3(2)(j), and pursuant to Utah Code Ann. § 78-2-2(4); the Utah Supreme Court, by order dated September 13, 2004, transferred the matter to this Court. (R. 1558) (This is a personal injury case, not a domestic relations case as implied by appellant's citation to Utah Code Ann. § 78-2a-3(2)(h).)

ISSUES PRESENTED ON APPEAL

1. Was summary judgment proper on Shane M. Clayson's Federal Employers' Liability Act negligence claim against defendant Union Pacific Railroad Company?

2. Was summary judgment proper on Shane M. Clayson's Utah common law negligence claim against defendant Utah Railway Company?

3. Did Shane M. Clayson properly raise and preserve before the trial court and cite for this Court the evidence purportedly creating disputed issues of fact, and has he marshaled the evidence, as required in this Court?

STANDARD OF APPELLATE REVIEW

This Court reviews a trial court's conclusions of law on a motion for summary judgment for their correctness, without according deference to those conclusions. Barber v. Farmers Ins. Exch. 751 P.2d 248, 251 (Utah App. 1988). This standard applies to issues 1 and 2.

This Court must also review whether Shayne M. Clayson has properly preserved claims concerning disputed facts, particularly the purported evidence for such facts, before the trial court and this Court, and also whether he has properly marshaled evidence

required before this Court. That review requires a legal application of Rule 7 of the Utah Rules of Civil Procedure and Rule 24 of the Utah Rules of Appellate Procedure. The trial court's application of Rule 7 is reviewed by this Court for abuse of discretion. There must at least be citations to the record supporting disputed facts somewhere in the opposition papers. Gary Porter Const. v. Fox Const., Inc., 2004 UT App 354, ¶¶ 12-15, 101 P.3d 371, 375-77. This Court enforces Rule 24 as to both the required citation to the evidence of record and marshaling of evidence on appeal. Koulis v. Standard Oil Co. of California, 746 P.2d 1182, 1184-85 (Utah App. 1987); Steele v. Board of Review of Indus. Com'n of Utah, 845 P.2d 960, 961-62 (Utah App. 1993); Utah Medical Prods., Inc. v. Searcy, 958 P.2d 228, 232 (Utah 1998); Wilson Supply, Inc. v. Fraden Mrg. Corp., 2002 UT 94, ¶¶ 21-26, 54 P.3d 1177, 1183-84. Defendants preserved this issue before the trial court at R. 1374-1425. This standard applies to issue 3.

DETERMINATIVE RULES

Contrary to the assertion contained on page 2 of Shayne M. Clayson's ("Mr. Clayson") brief, the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, et seq., is not determinative of this appeal, though its provisions do apply to Mr. Clayson's claim against UPRR. The FELA requires evidence to prove the elements of negligence that are identical to the elements required to prove Utah common law negligence and causation.

Rules that are determinative on Mr. Clayson's duty to present evidence to create a genuine issue of material fact and to marshal evidence on appeal, include the following:

1. Utah Rule of Civil Procedure 7(c)(3)(B) – "A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving

party's facts that is controverted . . . [and] shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials."

2. Utah Rule of Appellate Procedure 24(a)(7) – "All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule."

3. Utah Rules of Appellate Procedure 24(a)(9) – "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."

STATEMENT OF THE CASE

This is a negligence case seeking recovery for personal injuries. On December 4, 2000, Mr. Clayson backed onto railroad tracks belonging to defendant Union Pacific Railroad Company ("UPRR"), where he immediately was struck by a train owned and operated by defendant Utah Railway Company ("URC"). The accident occurred 13 feet south of a railroad crossing at 1800 North and approximately 1000 West (Warm Springs Road) in Salt Lake City, Utah. The tracks in this area generally run north-south and the street generally runs east-west. As part of his job as a signal maintainer for UPRR, Mr. Clayson had been working near signal boxes just east of the track and south of the crossing before he backed onto the track in front of the moving train.

Mr. Clayson sued his employer, UPRR, under the FELA, alleging specific acts of negligence. He brought a common law negligence claim against URC, alleging other

specific acts of negligence. All of Mr. Clayson's theories of negligence were predicated on the allegation in his Complaint that he "had been given track authority [the right to be on the track to the exclusion of all trains and other moving equipment], when without warning, he was struck by a train." (R. 2) After extensive discovery, the evidence was uniformly contrary to this key allegation.

Mr. Clayson in fact admitted at his deposition he did not have track authority. (R. 720-21) He admitted that he was expressly denied track authority because the subject train was approaching. He was to call back to see if he could have track authority after this train passed by him. (Id.) Very shortly after being told of the approaching train, Mr. Clayson backed onto the track with a cell phone pressed against one ear and his hand pressed against the other ear. (R. 736, 808-09, 817-21, 824, 827-28, 833-35, 842-45, 848-50, 853) Mr. Clayson backed onto the track immediately in front of the approaching train. Not only did Mr. Clayson back onto the track, he did so with his back to the direction of the oncoming train (south). Moreover, he did this after being advised that this train was approaching from that direction (south). The train was placed into emergency and slowed somewhat but could not be stopped before hitting Mr. Clayson. (Id.) Both defendant railroads filed a motion for summary judgment, with supporting memorandum and exhibits. (R. 669-853) Mr. Clayson filed a "response" with numerous exhibits. (R. 880-1136) Mr. Clayson also filed a separate memorandum with duplicative exhibits. (R. 1137-1321) Defendants then filed a reply memorandum. (R. 1370-1501) After hearing oral argument on July 6, 2004, the trial court, on July 26, 2004, granted defendants' motion for summary judgment. (R. 1512-1515)

Mr. Clayson conceded before the trial court all of the aforementioned essential facts that are contrary to his key allegation. (R. 676-77 (¶ 8), 678-79 (¶¶ 18-19), 882 (¶ 8), 885 (¶¶ 18-19)) Mr. Clayson also stated other facts that were immaterial, and, in most instances, he failed to provide citations to any supporting evidence. (R. 886-91, 1399-1425) The trial court ruled Mr. Clayson's purported disputed facts were not material or not truly disputed. (R. 1513-14) The trial court's Order And Judgment Of Dismissal In Favor Of Both Defendants was entered October 4, 2004. (R. 1561-62) Mr. Clayson now appeals the trial court's correct decision that the undisputed facts prevent any of his theories of negligence from being viable. His Notice of Appeal was filed August 25, 2004. (R. 1546-47)

STATEMENT OF FACTS

A. Introduction

Mr. Clayson never cited the trial court to any evidence in the record to support the facts he assumed in an effort to a create dispute of material facts (as required by Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure). Also, in his appeal brief, Mr. Clayson makes no citations to the record before the trial court. Thus, in violation of Rule 24(a)(7) and (e) of the Utah Rules of Appellate Procedure, all statements of facts and references to the proceedings below made by Mr. Clayson in his brief are not properly supported. By not specifically addressing each of Mr. Clayson's unsupported statements of facts or references, defendants do not concede that any of Mr. Clayson's statements and references are accurate, or that there is any evidentiary basis to create a genuine issue of a material fact, or for that matter, an immaterial fact.

It is undisputed that Mr. Clayson was injured when he backed in front of a moving train. He knew the train had the right to be moving on the track and he knew it was approaching from the south. Nevertheless, he inexplicably stepped onto the track with his ears covered, without looking and with his back to the south. Unfortunately, he did so when the train was too close to be stopped before hitting him from behind.

No other facts make any difference. Claims that the UPRR dispatcher should have directed the train to proceed under a different rule are misleading and irrelevant. This train was in the process of slowing for a stop signal just north of the subject crossing. It would not have been traveling slower had it been proceeding under a different rule. Moreover, the train's speed makes no difference if someone is going to walk in front of it at a point where it is unable to stop. To claim this accident would not have happened had the train been traveling slower is the same as arguing the accident wouldn't have happened if Mr. Clayson had been further from the train when he stepped onto the tracks. Finally, there is no probative evidence that the URC train horn was not sounded. Moreover, the train bell was ringing and Mr. Clayson had a cell phone pressed to one ear and his hand pressed to the other ear when he backed in front of the train. There is no evidence Mr. Clayson was listening for the train he knew was approaching.

B. <u>The Facts of this Case</u>

Mr. Clayson worked for UPRR as a signal maintainer. He testified that when he arrived at the 1800 North crossing on December 4, 2000, he saw that the crossing gates were lowered and the lights were flashing when they should not have been. The street at that crossing traverses mainline track and spur or yard tracks approximately fifty feet east

of the mainline track. (R. 415) Mr. Clayson determined that the crossing signals were malfunctioning because they were activated and warning motorists of an approaching train when there was no approaching train. (R. 882 (¶ 4)) Mr. Clayson parked his truck near signal boxes located just south of the crossing, east of the mainline track and west of the yard tracks. (His truck can be seen in the photographs at R. 404-05, 415.) After approximately an hour of preparation, and pursuant to his "On Track Safety" training, Mr. Clayson called the dispatcher to request "track and time" authority. This is express permission to occupy a specified section of track to the exclusion of trains and anything else (e.g., track inspection or maintenance equipment) until such protection is released. (R. 719-21) Mr. Clayson was denied "track and time" on UPRR's mainline track because a train, URC's train designated as RUT311, was approaching from the south on the mainline track. (R. 721, 739-41, 796, 882 (¶¶ 5-6), 1440)

Shortly before the subject accident, URC's RUT311 train crew had advised the UPRR dispatcher that they would be proceeding north on the mainline track through this area. Unrelated to the crossing signals that control automobile traffic at railroad crossings, train movement is controlled by signals, much like traffic lights, called block signals. Whereas crossing signals are automatically triggered by approaching trains, block signals are controlled by the dispatcher. However, after the RUT311 requested permission to proceed, the UPRR dispatcher could not change two block signals, CP786 and CP787, from red to green. CP787 is just north of the subject crossing and CP786 is just south of that crossing. Both of these block signals remained red which requires oncoming trains to stop and not proceed unless the dispatcher gives them oral permission

over the radio to proceed. Knowing that there were no trains ahead of the RUT311, the dispatcher decided to "talk" the trains through the red block signals. He had to do this separately for each of the red block signals. That is, after being cleared to proceed through the red signal south of the subject crossing, the train would have to slow and stop for the second red block signal (the one just north of the crossing) and again be given permission by the dispatcher to proceed (be "talked") through that one. The following conversation between the dispatcher and train RUT311 was recorded on the dispatch tape:

Dispatcher:	Dispatcher to the RUT311 over.
RUT311:	311 over.
Dispatcher:	I can't get those signals again to light up there at 786, I'll have to talk to you by it. After stopping at 786 you do have authority to pass the signal displaying stop eastbound[1] main to main. Over.
RUT311:	RUT311 understands that after stopping at CP786 have authority to pass signal displaying stop eastbound main to main, over.
Dispatcher:	That is correct. Over. And also while I got you we'll have to [do] the same thing at 787 there. So after stopping at 787 you do have authority to pass the signal displaying stop, eastbound main to main. Over.
RUT311:	All right, after stopping CP787 we have authority to pass signal displaying stop, eastbound main to main. Over.
Dispatcher:	That is correct over, dispatch out. (R. 794-95)

Mr. Clayson heard this conversation over the radio. It was soon after this conversation that he asked for "track and time."

Clayson:	Hello dispatch.

[1]In railroad terminology, there only is eastbound and westbound regardless of compass directions. Although the train was going compass north at the time, the track ultimately went east rather than west. Thus, it is described as an eastbound mainline track.

* * *

Dispatcher:	Anybody else on the radio?
Clayson:	Maintainer Clayson [not understandable].
Dispatcher:	Yeah, Clayson.
Clayson:	Yeah, **after this train goes by me** here from C786 to C787 how does it look to get some track and time out there to look and see what the problem is, over.
Dispatcher:	Yeah, it looks good **after** he gets by. I'll give you some time there, dispatch out. (R. 796)

It is interesting to note that at no time did Mr. Clayson have a conversation with the UPRR dispatcher about any problem with the crossing signals at the 1800 North crossing. The only signal problems discussed were the block signals at CP786 and CP787.

Nevertheless, knowing he was denied "track and time" and that a train was approaching from the south, Mr. Clayson testified that he looked up and down the track and then went onto the track just south of the crossing to take some electrical readings on the rails. He did so pursuant to UPRR's "Individual Train Detection" rules which require the person, before fouling a live track, to fill out a "Statement of On-Track Safety" also known as a "lone worker permit." (R. 719-21, 725-34, 705, 882 (¶ 8)) Through the process of completing that permit, the person determines the maximum authorized speed for the track and corresponding minimum required distance to be able to see and hear an approaching train and get off the track within 15 seconds.[2] The person using this form of on-track safety protection must look and listen and be able to see and hear any

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[2]Defendants' expert accident reconstruction witness, Jon E. Bready, testified that at 20 miles per hour, a train approaching from the south could be seen for at least 30 seconds before reaching the crossing. That was the fastest the RUT311 train ever approached after it passed the CP786 block signal. Also, the sight distance looking south down the track from Mr. Clayson's position was over 900 feet. (R. 752-54)

approaching train for at least the required distance determined by that person when completing the permit. Mr. Clayson completed such a permit, indicating that, at a train speed of 20 mph, he needed to be able to see and hear 440 feet up and down the track, and he accordingly looked and listened before he went onto the track to take his meter readings. (R. 707-16, 721, 726, 744-45, 750, 883 (¶¶ 9-11))

After safely taking the readings in accordance with UPRR's training, he then returned to his truck to call his supervisor, Mr. Nash, with whom he discussed his readings. Mr. Clayson testified that Mr. Nash told Mr. Clayson to repeat the tests because the readings did not make sense. Mr. Clayson recalls getting his equipment and approaching the track a second time, while still talking with Mr. Nash on his cell phone, but he recalls nothing from that point until after the accident. He does not recall reaching the track or looking and listening for approaching trains as he had done before. (R. 734-37, 883 (¶ 11)) Mr. Clayson confirmed he was not rushed and there was no reason he could not again have looked and listened for approaching trains before going onto the track. (R. 746-49, 884 (¶ 14)) There is no dispute this north bound train could have been seen by Mr. Clayson for over 30 seconds at the maximum speed it attained after proceeding though the first block signal. Of course to the extent it was traveling slower, it could have been seen for a longer period of time as it approached Mr. Clayson's position. (R. 752-54)

Mr. Nash testified that Mr. Clayson called him and that he was having difficulty figuring out what was going on with that crossing signal. During his telephone conversation with Mr. Clayson, the phone made a crackling noise and simply went dead.

(R. 906-07)

The RUT311 train crew testified that when they first saw Mr. Clayson, he came from behind the signal boxes and he walked onto the track with his back to the train and without looking for a train. The engineer, Chad Booth, testified that after the dispatcher gave him authority to pass the red block signal at CP786, he proceeded at 17 to 20 miles per hour. The front of the train was estimated to be only 150 to 200 feet south from the point of impact when he saw Mr. Clayson suddenly back away from the signal boxes and proceed onto the track with his back to the oncoming train. Mr. Booth applied the emergency brakes and continued sounding the horn. Before the emergency brakes were applied, the train already had slowed to an estimated 13 to 14 mph because it was in the process of slowing in order to stop at the next block signal, CP787. Nevertheless, the train could not be stopped until over 300 feet past the point of impact. (R. 752-54) The conductor, Steve Clifton, testified that he first saw Mr. Clayson when Mr. Clayson backed out in front of the train, from the signal boxes, when the train was estimated to be only 100 to 150 feet away. He never saw Mr. Clayson look for the approaching train. Mr. Clayson was facing the opposite direction, and it looked like he was covering his ears. The train's emergency brakes were applied but Mr. Clayson was hit before the train could be stopped. (R. 1262-63) The brakeman, Engolf Layne Deros, also testified that Mr. Clayson walked onto the track in front of the train without looking. The train brakes were put into emergency stop application but the train could not be stopped before hitting Mr. Clayson. (R. 832-36)

Their testimony is corroborated by the testimony of an independent eyewitness,

Carl Snyder, who was closer to Mr. Clayson at the time of the accident than any other witness besides the train crew. He was stopped immediately behind the lowered crossing gate west of the 1800 North crossing looking southeast across the mainline track at Mr. Clayson while Mr. Clayson was at the signal boxes. He testified that he first heard the train horn, then saw Mr. Clayson back away from the signal boxes, turn to his left (thereby facing north) and move onto the track without looking south toward the train. It was only a few seconds from when Mr. Clayson backed from the signal boxes onto the track until he was hit. He saw that Mr. Clayson had a cell phone up to one ear and his hand over the other ear. (R. 841-53)

There is no dispute in the evidence of record that the train could not stop before hitting Mr. Clayson after Mr. Clayson walked onto the track in front of it. (R. 884 (¶ 16)) In response to the facts presented by the defendants, in support of their motion for summary judgment, Mr. Clayson expressly admitted he unexpectedly started to back onto the track when the train was no farther than 100 to 200 feet from him. He also admitted he straddled the eastern rail with his back to the northbound URC train, without looking south toward the approaching train and while he pressed a cell phone to one ear and his hand over the other ear. (R. 885 (¶¶ 18-19)) He further admitted that the train's emergency brakes were applied but the train could not be stopped before hitting him, and the train in fact continued over 300 feet north of the crossing before it came to a stop. (R. 886 (¶¶ 21-22))

As for the potential warning from the locomotive horn, Mr. Clayson obtained testimony from others that they do not recall hearing a horn. These people were to the

east and northeast across the yard tracks and at the intermodal yard. They all testified that they were inside enclosed vehicles and/or involved in various activities and were not watching for a train or actively listening for a locomotive horn. Not one of them was aware of the train until after Mr. Clayson was first hit. The actual testimony of these witnesses, as found in the record, is contrary to Mr. Clayson's mischaracterization in his brief.

Ron Nash, Mr. Clayson's supervisor, testified that he was not at the accident scene but he was speaking with Mr. Clayson from his office over the telephone, and he heard a crackling noise before Mr. Clayson's cell phone went dead:

> Q. Now, when is the first time, then that you became aware that Shayne was called to the 17th Street crossing?
> A. When he called me on the phone.
> * * *
> A. [I]t [the phone] **just made kind of a crackling noise** and that was it.
> Q. Did you, were you and Shayne talking up to the point that it went dead?
> A. From what I can remember, yes. (R. 907 (p. 56, lines 9-12), 906 (p. 59, lines 9-13) (emphasis added))

Rebecca Cook, a motorist in the area, testified that she did not see the train when it hit Mr. Clayson in the back, she was not paying attention because she was in a vehicle, with its windows up, east of the crossing stopped behind the crossing gate and was talking with her husband while waiting for the gate to be raised:[3]

> Q. And did you actually see the train strike Shayne?

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[3]Her and her husband's distance from the point of impact was at least 100 feet to the east. (R. 759) The distance of the train as it approached from the south would have been further. The automobile she was in also was in the midst of semi trucks also stopped at the crossing with their engines running, as discussed by Mr. Paulson.

A. I didn't actually see it hit him the first time. My husband was the one that said – you know, I didn't realize he'd been hit until any [sic] husband said, Oh, My _____, that guy just got hit.

* * *

Q. And, of course, you were stopped for the crossing behind the gate?
A. Yes.
Q. So you weren't about to drive over the tracks at any time –
A. No.
Q. – until the gates were raised?
A. No . . ..

* * *

Q. Of course, you didn't know there was going to be an accident between the train and Shayne, did you?
A. No.
Q. And up to the time that there was a collision with – between the train and Shayne, if I understand your testimony, you were talking with your husband?
A. Off and on. We were – yeah, just kind of sitting there. We weren't having a constant conversation. You know what I mean? I was –
Q. You were just being together during the lunch break –
A. Yeah, yes.
Q – waiting for the gates to go up so that you could proceed on your drive and eventually he could go back to work?
A. Yes.
Q. And you had no reason to think that a train was going to be crossing through that crossing because you didn't see one that you thought was going to go through it?
A. Correct.
Q. **And you weren't making any effort to try to hear a train horn, were you?**
A. **No.**
Q. You didn't roll down your window?
A. No. (R. 1123 (p. 39, lines 9-15), 1124 (p. 41, lines 5-12 and 20-25, and p. 42, lines 1-22) (emphasis added))

Rhett Cook testified consistently with his wife about the factual context of her and his activities at the time:

Q. While you were there [behind the east crossing gate] before the accident as you've described, and you've just gone over talking with your wife and checking from time to time and that sort of thing, **were you actively listening to see if you could hear a train**

whistle?

A. **Not really.**

Q. Didn't roll down your windows or –

* * *

A. Okay. Wait, wait. No, no. The windows weren't rolled down . . .. No, the windows were rolled up. I think the heater was on.

Q. Did you have the heater on?

A. Probably.

Q. Did you have the radio on?

A. No, because we were talking. I can't – my hearings bad enough. I can't hear with the radio on.

* * *

Q. Do you know whether you have a hearing loss?

A. I probably do. (R. 1140 (p. 31, lines 2-9 and 13-24, p. 32, lines 3-5) (emphasis added))

An UPRR employee, Einor Paulson, also did not recall hearing the train's horn. At the time he was working an estimated 175[4] feet northeast of the crossing in the bucket of a bucket truck stopped in the intermodal yard (where semi trucks were picking up containers and trailers for transport over the road). He also testified that he did not recall **seeing** the train before the accident and that he was not **trying to listen** for a train horn. He did not hear the sound of the train on the tracks, the sound of the brakes being applied or the sound of the cars jerking to an emergency stop.

Q. Now the bucket truck, does it operate such that the motor of the truck has to be running?

A. Yes, it does.

Q. So down below where you were in your bucket, was your truck with the engine running?

A. Once I - - yes, once I got into the bucket, yes.

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[4]Mr. Bready's measurements reflect Mr. Paulsen's distance from the point of impact to be much greater than Mr. Paulsen's estimated 175 feet and the 50 feet argued without support by Mr. Clayson's counsel. (R. 759) Mr. Paulsen did not measure that distance. (R. 1203 (p. 44, lines 2-4)) The distance of the train as it approached would have been further.

Q. And you had told us about the fact that there are semi trucks moving intermodal containers, trailers out of the intermodal facility that were becoming a traffic jam at this crossing because the gates were down. Is that correct?

A. That's correct.

Q. And were those trucks lining up clear to the north, past where you were in order to get out of that facility at the time you were there?

A. Yes.

Q. So there were trucks down in that parking lot next to your truck with their engines running?

A. That's correct.

* * *

Q. Now, do I understand correctly that you actually did not see the locomotive strike Mr. Clayson?

A. I do not remember.

Q. You don't remember seeing that?

A. No.

Q. **At this point, I understand correctly, what you remember is seeing a train come to a stop, and then that led you to other observations where you learned that Mr. Clayson had been hit. Is that correct?**

A. **That's – that's correct.**

* * *

Q. . . . Did you have any reason to have concern about a train hitting Mr. Clayson?

A. No.

Q. From where you were in your bucket truck, you certainly had no reason to think that a train might harm you in any way?

A. That's correct.

Q. So at the time you were working, just prior to when you happened to notice down and see the train come to a stop, you were not actively listening for a train horn. Is that true or not?

A. I, I guess I really don't understand the question.

Q. Well, let me try it this way. You understand that when a motorist comes to a crossing, he has a duty to stop, look, and listen. Correct?

A. Correct.

Q. And that would include actively not only turning your head and actually looking, but actually listening to see if a train was coming?

A. That's correct.

Q. **You were not in any position where you were actively trying to listen for a train horn or whistle, just prior to when you noticed that train coming to a stop, were you?**

A. **Not something that would be intentional.**

Q. **Okay.**

A. **No, for me – like I say, for me, I felt – and I think I stated it briefly before, I was clear of the track. I was – it – there was no reason for me other than the fact of my general location to be concerned about a train. So I was not using any, actually any form of or – track safety other than being clear of the track. So in my job, I would not be looking for, nor waiting for, or doing anything that would ask me to look for a train at any given time. Like I stated before, usually if something like that happens, if you hear it, it draws your attention. But I was not actively standing there waiting for any type of train or any type of whistle.** (R. 1208 (p. 64, lines 2-24), 1210 (p. 65, lines 12-23, p. 66, lines 6-25, p. 67, lines 1-23) (emphasis added))

Although these witnesses were closer to the accident site than someone 10 miles away, their statements that they did not hear a horn is no more probative than a similar statement from a person who was 10 miles from the accident.[5]

Other evidence proves that the horn was sounded. **Engineer Robbie Chad Booth blew the whistle and testified:**

Q. All right. Did you blow for the crossing?

A. Yes.

Q. And when did you start blowing for the crossing?

A. At the whistle board.

Q. And where is the whistle board in relationship to our photograph [depo. exhibit 3 (R. 824)]?

A. Around the curve. It's about right in there (Indicating). It's back beyond the actual vision of the picture.

Q. Okay. And what are the requirements for blowing?

A. Two longs, a short, and a long.

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[5]In his brief, Mr. Clayson also claims the train's event recorder or "black box," as Mr. Clayson describes the device, showed the whistle had not been sounded. (Aplt. Brief p. 6) There is no citation to the record because Mr. Clayson is wrong. The event recorder actually showed that the horn was activated, but it showed it was activated for a longer period of time than any witness remembered. Thus, for purposes of the summary judgment motion, the event recorder was not relied upon by defendants as evidence that the horn was blown.

Q. **And did you blow in that fashion up to the time that you hit Shayne?**

A. **I blew in that fashion up to the time I seen he wasn't going to get out of the way.**

* * *

Q. **Did you ever hesitate to blow your horn after seeing Shayne Clayson because of the high decibels that those horns have?**

A. **No.**

Q. Does that horn or that particular locomotive – was it a two stage valve, or did it have like a valve you control on it that you could control the decibels on that horn?

A. No, you can't control the volume.

Q. It is what it is.

A. It is. Yeah.

* * *

Q. **And you told us – were you blowing your horn at the time you, that you that you actually struck him?**

A. **Yes.** (R. 810 (lines 1-18), 816 (lines 6-16), 817 (lines 14-17) (emphasis added))

Conductor Steve Clifton heard the whistle and testified:

Q. What did you see Shayne do or, you know, who did you observe as far as his location and what he was doing?

A. When we was coming down, the signal box was open, which the door faces us. So we could not see nothing until he stepped out onto the rail with his back to us. **He had looked like he had something to his ear or he was covering his ears or something. I couldn't tell. And we was blowing the horn, and had the bell and everything going.** And up until the time we hit him, he never see us, as far as I know. I couldn't look when we hit him. I looked away.

* * *

Q. Can you tell me what – what the – you say the horn was blowing. When did Chad start blowing the horn?

A. At the whistle board, I would assume. It's been awhile.

Q. And can you tell me the type of blowing that he did? In other words, was it solid? Was it one beep, two longs, one short? You know, how was he blowing?

A. I don't recall. **I do know he was blowing, because he was laying on it pretty good when we seen him and the guys from the intermodal came over, because they heard it.** (R. 828 (lines 1-15),

829 (lines 9-21) (emphasis added))

Brakeman Engolf Layn Deros also heard the whistle and testified:

Q. All right. **And do you know if Chad was ring the horn?**
A. **Oh, yes.**
Q. When did he start blowing his horn?
A. Well, I don't remember prior to – to seeing the guy when he started, but **I know it was going constantly all the time once he started out.**
Q. Once he saw him?
A. Once he saw him – well, like I said, I don't know prior when he started, I'm sure he was. **But I know that horn was going as hard as it could go. I even thought of getting out on the nose and yelling at the guy, but I knew it wouldn't do any good with the horn blowing as loud as it was.** (R. 836 (lines 15-25), 837 (lines 1-4) (emphasis added))

Independent witness Carl Leroy Snyder, who was closer than anyone else to Mr. Clayson except for the train crew,[6] also heard the whistle and testified:

Q. Pick up from that point and tell us what you recall seeing.
A. There was a train stopped down the track a ways off to the south.
Q. On that first track closest to you?
A. Yes, on the very first track.
Q. Also we could call it the westernmost track?
A. Yes, the westernmost track.
Q. Okay. Go ahead.
A. Let me see. Well, the train started to move. It was – it started coming along and it was down there, I can't even recall how far. It started to move. **The fellow at the box that was working on the box, the railroad worker got a phone call on the cell phone, put it up to his ear. The train was coming and blowing its horn, I guess is the best way to describe it. The train was blowing its horn and it was so loud that he covered his right ear.**
Q. **Who covered his right ear?**
A. **The railroad worker that was on the cell phone.**
Q. **So he had the phone up to his left ear?**

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[6]He was approximately 30 feet from Mr. Clayson, looking directly at him while stopped at the western crossing gate. (R. 761)

A. **Yeah.**
Q. **And covered his right ear?**
A. **Correct.**
Q. What else did you see?
A. And he started backing up backwards toward the track. **I guess he couldn't hear because of the noise or whatever, but he just kept pushing the cell phone as hard as he could and pushing his – you know, covering his other ear because the train was so loud. You know, I had considered hitting my horn on my semi because they're pretty loud, but it would have been ineffective. He probably would not have heard it.** So anyway, he continued to back up backwards toward the track and finally had his left leg across the first rail and his right leg –
Q. East?
A. – east of the first rail when the train hit him . . ..

* * *

Q. **Was the train horn or whistle that you said was being blown, could you hear that before he started to back up onto the tracks?**
A. **Yes. I believe that's why he covered his ears because it was just so loud and pretty much constant.**

* * *

Q. **And what called your attention to the train?**
A. **When it started getting closer and the horn was blowing.**

* * *

Q. Now, you say, as I understand your testimony, you heard the train, sometimes they call it a whistle, sometimes they call it a horn, but how far was the train away from this individual when you first heard the train horn?
A. I don't even – I still don't recall.
Q. Down the tracks to the south some distance?
A. Yes.
Q. **And how many times did you hear the horn blow?**
A. **I can't say for sure. It just seemed like it was constant. I'm sure there was a break in there, but I wasn't counting the number of breaks.**

* * *

Q. All right. **Now, are you absolutely certain that it was the train that hit this pedestrian horn that was operating or could it have been the horn of another train in the area that was operating?**
A. There was only one train moving. You know, the other two tracks were clear. There was no other trains moving.
Q. (By Mr. Hoyt) In front of you?

A. Yeah.
Q. Clear in front of you?
A. **Yes. Now, my horn will sound over top of the noise, the engine noise of a train. It will not be heard over top of the horn of a train. And it was so loud, you know, I was actually reaching up to blow my air horn to warn the guy, but it's like it would have been ineffective. It was just too loud, you wouldn't have even heard my horn. There is no doubt in my mind that that train was blowing – that train had to be the one blowing its horn as a warning.** (R. 841 (lines 21-25), 842 (lines 1-25), 843 (lines 1-11), 845 (lines 8-13), 846 (lines 23-25), 847 (line 1), 850 (lines 4-17), 851 (lines 5-25), 852 (lines 1-4) (emphasis added))

In light of this positive evidence, the particular negative evidence relied upon by Mr. Clayson is addressed further in the Argument section, infra.

SUMMARY OF ARGUMENT

There may be differing recollections and testimony on some facts, but there is no dispute about the following facts: (1) Mr. Clayson knew the track was not protected from moving trains, and in fact, the URC train had the right to approach and was approaching from the south; (2) Mr. Clayson went onto the track in front of that very train with his back to it, without ever looking towards it and with his ears covered contrary to common sense and in violation of the on-track safety training he had received and previously utilized; and (3) when he did so, the application of the train's emergency brakes could not stop the train until long after Mr. Clayson was hit from behind. Upon these undisputed facts, nothing else is material. The law does not require UPRR or URC to have done more to protect Mr. Clayson from his own failure to follow his training and common sense.

Mr. Clayson does not provide legal argument in support of any purported factual

issues he attempts to raise on appeal. He and his "expert" witness make only conclusory statements without discussing, or even citing, evidence of record to support the factual assumptions underlying those conclusions. Mr. Clayson does not even try to explain how any of those unsupported, assumption-based conclusions could be material in light of the undisputed facts he admits and the law pertaining to those undisputed facts.

Rather, Mr. Clayson only discusses general FELA law applicable only to UPRR. He concedes the FELA requires evidence of negligence. However, his argument that it allows less evidence of negligence than what is required for common law negligence is incorrect and simply makes no sense. Mr. Clayson has failed to provide any analysis on how some lesser quantum of evidence standard applies to any specific evidence in this case. Indeed, there is no evidence to prove UPRR was negligent in any material way. Even if it was, such negligence cannot be deemed a cause of this accident. The only cause of this accident is Mr. Clayson's backing onto a live track in front of a moving train.

UPRR had no duty to prevent the URC train from moving on the track toward Mr. Clayson. Mr. Clayson knew it was approaching and could be coming as fast as 20 mph. Mr. Clayson knew the particular rules mandated by UPRR for his own protection from such a moving train. He alone failed to comply with those rules. There would have been no accident had he complied or used common sense. No requirement for a slower train speed or additional training would have made any difference.

Mr. Clayson makes no legal argument whatsoever with respect to URC. The only apparent theory made against URC is that the engineer failed to sound the train horn. Mr. Clayson ignores the undisputed evidence that the train bell was sounding in full

compliance with Utah law. Moreover, there is solid testimony from four different witnesses that the horn was sounded and that it was loud. The negative evidence of those who do not recall hearing the horn is not probative, and cannot preclude summary judgment under Utah law. Those witnesses had their attention diverted, they were not necessarily in positions to be able to hear, and they had no reason to listen and were not listening for a train horn. Any probative evidence to create a dispute still would not create a material issue because Mr. Clayson was actively trying not to hear a train horn, he was concentrating on other matters and he had his senses impaired. Upon these facts, the law does not allow a jury to speculate that any failure to sound a horn was a cause of Mr. Clayson's actions over those other more probable causes that he simply tried not to hear it, did not focus on it or could not appreciate what he was hearing.

Finally, Mr. Clayson's appeal should be dismissed because he has not properly cited the trial court or this Court to admissible evidence of record supporting his fact intensive conclusions. Also, as to his allegation that the horn was not sounded, he has not marshaled evidence as he is required to do. He has not first shown all evidence supporting the trial court's factual finding that the negative whistle witnesses were not in positions that they necessarily would have heard and they were not listening for a train horn, and then explain how all such supporting evidence is insufficient to support the trial court's evidentiary ruling. These procedural violations are serious and should preclude Mr. Clayson from proceeding with this appeal.

ARGUMENT

A. Introduction

Mr. Clayson cannot recover from his employer, UPRR, under Utah common law, but only under the FELA. Likewise, Mr. Clayson cannot recover from URC under the FELA, but only under Utah common law. (R. 152-53, 239-40) Nevertheless, both causes of action require findings that the negligence of the defendant caused Mr. Clayson's injuries. This is not disputed by Mr. Clayson. In this case, the undisputed essential facts are: (1) UPRR had the right to allow train movement on its track; (2) the URC train had the right to be moving on UPRR's track; (3) Mr. Clayson knew the URC train was approaching from the south; (4) he violated UPRR's rules and the training given to him, and common sense, when he backed onto a live track without looking and with his back to the direction of the oncoming train; (5) while talking on a cell phone; and finally (6) the train could not stop before hitting him despite having the emergency brakes applied.

Mr. Clayson claims in his Summary of Argument (Aplt. Brief 11-13) that there are issues of fact as to whether (1) URC operated its train in accordance with 49 C.F.R. § 234.107 and (2) sounded the locomotive horn, and whether (3) UPRR gave to URC an operating order (called by UPRR an XH Order) in accordance with 49 C.F.R.§ 234.107. Mr. Clayson does not therein state that there is an issue of fact pertaining to UPRR's training of Mr. Clayson, but he took that position in his Statement of Facts. However, nowhere in Mr. Clayson's Argument section (Aplt. Brief 13-22) is there any argument in favor of any of these purported issues of fact. The above three subjects Mr. Clayson says he will argue merely are restated as conclusions, without any argument, on page 14 of his

brief (Point I). Two of these subjects are again restated as conclusions on page 20 of his brief (Point III), in the context of his "expert" reaching these two conclusions.[7] There is no explanation of what evidence of record exists to support the assumptions Mr. Clayson and his "expert" make. No analysis is made of the law applicable to any specific evidence of record in this case. No effort is made by Mr. Clayson to explain how any of these subjects can be material in light of the undisputed facts he admits and the controlling law.

B. The District Court Properly Rejected Mr. Clayson's FELA Claim UPRR Was Negligent and Such Negligence Caused This Accident

1. Negligence

In his brief, Mr. Clayson focuses exclusively on general FELA law. In this case, the FELA is only applicable to Mr. Clayson's employer, UPRR. It is not applicable to the other railroad, URC, because that railroad did not employ Mr. Clayson. The FELA provides that a common carrier engaged in interstate commerce, "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such

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[7]Mr. Clayson refers to an Affidavit of Charles Culver that he attached to his brief. Mr. Clayson claims that this "expert" formed the same opinions as his counsel's conclusions. Mr. Culver's opinions are inadmissible for many reasons. Defendants moved in limine for the exclusion of his inadmissible opinions. (R. 333-668) That motion was submitted for decision on April 8, 2004, before the trial court's ruling on the defendants' later motion for summary judgment. (R. 868-70) However, summary judgment was granted before a ruling on the motion in limine. Nevertheless, for purposes of their motion for summary judgment, defendants conceded the factual assumptions made by Mr. Clayson and Mr. Culver for his opinions. (R. 1422-23 (¶ 27e)) As with Mr. Clayson's arguments, no evidence of record is cited to support the factual assumptions made by Mr. Culver.

injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51(emphasis added).

By its language, the statute incorporates a negligence standard of liability. That standard imposes the traditional elements for common law negligence claims: duty, breach of duty, foreseeability, and causation. Handy v. Union Pacific R. Co., 841 P.2d 1210, 1218-20 (Utah App. 1992). See also Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67 (1943) (holding that "the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would do under the circumstances of the same situation."). FELA "negligence must be resolved according to common law principles as developed and applied by the federal courts." Handy, 841 P.2d at 1215. See also Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 541-44 (1994) (holding that common law principles are entitled to great weight in FELA analysis unless expressly rejected in the text of the statute).

Mr. Clayson is correct that the FELA is liberally construed to effectuate its purpose to provide an adequate remedy to railroaders injured from the negligence of their employers. However, the law is clear that railroad workers only can recover under the FELA for injuries caused by employer (including co-worker) negligence. 45 U.S.C. § 53. Thus, as Mr. Clayson concedes (Aplt Brief at 15-16), there is no right to recover, and no triable issue, without evidence of facts upon which the trier of fact could conclude that employer negligence was a cause of the injury. Inman v. Baltimore & Ohio R. Co., 361 U.S. 138 (1959). See also Walker v. Northeast Regional Commuter R. Corp., 225 F.3d

895 (7th Cir. 2000) (affirmed summary judgment where railroad employee could not prove employer negligence); Handy, 841 P.2d at 1214-15, 1218-19 (affirmed judgment for railroad employer, entered by trial court as a matter of law on motion for directed verdict, where plaintiff failed to present evidence sufficient to establish a prima facie case of FELA negligence). Creamer v. Ogden Union Ry. & Depot Co., 242 P.2d 575, 576-77 (Utah 1952), cert denied, 344 U.S. 912 (1953) (reversed jury verdict and judgment for employee where FELA negligence of railroad employer could not be proven); Duhon v. Southern Pac. Transp. Co., 720 So.2d 117 (La. App. 1998) (affirmed summary judgment where railroad employee argued, among other things, work place should have been "safer" instead of a breach of ordinary due care).

Mr. Clayson is incorrect in arguing that the FELA allows recovery upon less evidence of negligence than the evidence required to prove ordinary negligence in a common law action. That position makes no sense, and it is not the law. The case of Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), relied upon by Mr. Clayson, does not state that less evidence is required to prove FELA negligence than common law negligence. The Rogers case addresses causation not negligence. See discussion of causation, infra. The Rogers case does not stand for, and it is not accepted law, that some unexplained lesser amount of evidence can prove FELA negligence. A few rogue cases appear to have misinterpreted Rogers, but their reasoning is confused and any intelligent analysis recognizes their error.

"Ordinary negligence" has always been the standard of conduct, and probative evidence to prove at least some "ordinary negligence" of the employer caused the subject

injury is required. Tiller, 318 U.S. at 67. The Fifth Circuit has corrected itself on this point. Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997); Duhon, 720 So.2d at 120-21. Moreover, this Court in Handy, after discussing the Rogers case, also recognized that FELA negligence must be proven. 841 P.2d at 1215 ("Nonetheless, FELA does not impose strict liability . . . FELA bases employer's liability upon negligence concepts and not upon the mere fact that an employee has been injured.").

Mr. Clayson's argument for some lesser standard of care under FELA is refuted by the Model Utah Jury Instructions (MUJI). MUJI contains the following specific FELA instructions.

NO ABSOLUTE LIABILITY

> The law does not place an absolute liability on the defendant to respond in damages for every injury suffered by an employee while performing employment duties. This is a negligence case, and you must apply the rule of law that the plaintiff may not collect damages unless the plaintiff proves, that plaintiff's injury resulted from the negligence of the defendant. MUJI 14.2 (1993).

RAILROAD'S DUTY OF CARE

> The defendant has a continuing duty to provide its employees with a **reasonably** safe place to work and to use **reasonable** care under the circumstances to maintain and keep such place of work in a **reasonably** safe condition. This does not mean that the defendant is a guarantor or insurer of the safety of the work place. The defendant is not required to furnish an absolutely safe place to work. The defendant's duty is to **exercise ordinary care** to provide a **reasonably** safe place for its employees to perform the assigned work.
>
> The dangers involved in railroad work do not create any liability on the part of the railroad company if the company takes **reasonable** precautions **under the circumstances**. In order to find the defendant negligent, you must find that it exposed the plaintiff to an **unreasonable risk of harm under the circumstances.** (Emphasis added.) MUJI 14.3 (1993).

ELEMENTS OF PLAINTIFF'S CLAIM

> In order to prove the essential elements of the plaintiff's claim, the burden is on the plaintiff to prove the following facts:
>
> 1. The defendant was negligent in one or more of the ways claimed by the plaintiff; and
> 2. The defendant's negligence was a cause, in whole or in part, of the plaintiff's injury; and
> 3. The plaintiff incurred damages because of the injury. MUJI 14.4 (1993).

It is significant that the Comments to MUJI 14.4 then states:

> "Negligence should be defined after this instruction. See Negligence Instructions." (Emphasis added.) MUJI 14.4, Comments.

It is clear from this comment that the normal Utah instructions that define negligence are to be used when instructing a Utah jury in an FELA case.

Also, Mr. Clayson's erroneous legal argument is meaningless. If some lesser quantum of evidence could be sufficient, what is that lesser standard? Without articulating the lesser standard of proof he advocates, it is impossible to analyze what evidence he claims meets that standard. Perhaps this is why Mr. Clayson provides no analysis of specific evidence. In fact, there can be no analysis because there simply is no evidence whatsoever to prove material employer negligence, even some slight breach of ordinary care, caused Mr. Clayson to violate UPRR's rules and training by stepping in front of a moving train that Mr. Clayson knew was coming. Thus, Mr. Clayson resorts to making only unexplained conclusions that ignore the actual evidence and facts he has admitted.

On the admitted facts of this case, UPRR clearly observed and discharged its

FELA duty to provide Mr. Clayson a reasonably safe place to work. When working at the signal boxes 13 feet south of the 1800 North crossing, Mr. Clayson was not in any danger of being hit by a train unless he went onto the track. He was informed by the UPRR dispatcher that the URC train was approaching on the track near to where he was working. He earlier had asked for "track and time" authority which meant that no trains would be allowed to move on that track. He knew he was not given this protection because of the approaching train, and, therefore, he had to watch for trains, including the subject train he knew was coming, if he went onto the track. He knew that the "Individual Train Detection" rules applied should he go onto the track without "track and time" authority. He even completed the necessary "lone worker permit." He did so understanding that the approaching train might be moving toward him at a speed up to 20 mph. He also knew that permit required him to be able to look and listen for trains, such as the train he knew was coming, so that he would have at least 15 seconds to get off the track before the arrival of the train. Nevertheless, Mr. Clayson momentarily ignored his training and common sense and backed onto the track immediately in front of the moving train without looking and while actively trying to block out sounds other than his cell phone.

No law is cited by Mr. Clayson for the proposition that upon these admitted facts an FELA employer could be liable. No sane court would make such a legal ruling. Mr. Clayson knew the safety rules under which he was working. If he had complied with UPRR's rules, he would not have stepped in front of the moving train. These rules provided Mr. Clayson a safe place to work. Throughout his brief, Mr. Clayson makes no

attempt to suggest that these rules (1) did not apply, (2) that they were defective or that (3) they were otherwise inadequate for his protection and safety, had he complied with them. Mr. Clayson simply failed to obey these rules by going onto an active track in front of a train without first looking and listening for the very train he knew was coming, and the FELA imposes no liability upon employers for an injured employee's failure to comply with the employer's safety rules. See, e.g., Unadilla Valley Ry. v. Caldine, 278 U.S. 139, 142 (1928) (FELA plaintiff "cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about . . . by his own acts"); MacPherson v. Boston & Marine Corp., 439 F.2d 1089, 1096 (1st Cir. 1971), cert. denied, 404 U.S. 947 (1971) (directed verdict should have been entered for railroad where it had no reason to anticipate the plaintiff would violate the railroad's safety rule).

2. **Causation**

At first blush, the case of Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), relied upon by Mr. Clayson, may appear to offer a lesser level of causation in an FELA case. That Court used the phrases "any part," "even the slightest" and "however small" in describing actionable causation under the FELA. These phrases, however, were not used to create a new standard. They were used to explain the difference between contributory negligence at common law and the complete comparative negligence scheme under the FELA. The FELA was enacted in 1906 at a time when any amount of a plaintiff's contributory negligence operated as a complete bar to any recovery in a common law negligence case. Under the FELA, the plaintiff's contributory negligence is to be offset

proportionately against the negligence of his or her railroad employer. The railroad employee is not barred from recovery even if his or her negligence greatly exceeds that of the employer in causing the accident. See 45 U.S.C. § 53. See also Tiller v. Atlantic Coat Line R. Co., 318 U.S. 54, 62 (1943). Thus an FELA plaintiff can receive 1% of his damages even if his or her negligence was found to constitute 99% of the causes of the accident. So long as the negligence of the railroad was a cause of the accident to some degree ("however small" that percentage may be), the plaintiff gets to recover that "however small" portion of his or her damages.

Rogers does not change the fact that the railroad's negligence still must be an actual proximate cause of the accident. The Rogers Court did not rewrite the FELA. The statute only provides relief for the amount of injury "resulting from" the railroad employer's negligence. 45 U.S.C. § 51. Utah clearly recognizes this in the MUJI FELA causation instruction.

CAUSE DEFINED

> As the term "caused in whole or in part" is used in these instructions, an injury is "caused in whole or in part" by the acts, omissions or conditions of another when it appears that said acts or omissions of another played a part, [no matter how small,] in **actually bringing about or causing the injury**.
>
> You are further instructed that there can be more than one cause, and in fact there may be many causes, contributing to an injury. MUJI 14.7 (1993).

Indeed, the Comments to this instruction suggest the "no matter how small" language may "unduly slant the instruction." Whether or not that language should be included, it is clear that the railroad's negligence must actually bring about or cause the injury. MUJI 14.7, Comments.

3. Mr. Clayson's Claims That It Was Negligent Not To Impose An XH Order Or Provide More Training Are Unsupported And Immaterial

Mr. Clayson claims as fact, not law, that an XH Order should have been issued.[8] (Aplt. Brief 9) An XH Order pertains to the situation of a "false activation" of a crossing signal. If that happens, the signals indicate to motorists that it is not safe to cross the railroad tracks when, in fact, it is safe to do so. 49 C.F.R. § 234.5 (2000). An XH Order may require the train crew to reduce its speed to no greater than 15 mph when the lead locomotive passes through the crossing, if the crossing cannot be flagged. 49 C.F.R. § 234.107(d) (2000). Mr. Clayson's conclusion assumes first that the UPRR dispatcher was told by Mr. Clayson of the false activation of the crossing signals. He was not. Mr. Clayson next argues that with such knowledge the dispatcher should have ordered the crew to reduce the train's speed to 15 mph. This is based upon the assumption that although Mr. Clayson was at the crossing, for some reason he could not flag it. No such reason is offered. This argument also assumes that at 15 mph the URC crew somehow would have had the ability to stop the train before impact with Mr. Clayson after Mr. Clayson stepped in front of it. (Aplt. Brief 8-9) This also is not true. The train traveled more than 300 feet after striking Mr. Clayson. Mr. Clayson makes no showing that the train would not have traveled that far, let alone far enough to strike him, had it been

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[8]An XH Order should not be confused with an XG Order which applies when crossing signals don't activate when they are supposed to in order to warn motorists of an approaching train. Before the trial court, Mr. Clayson argued that an XG Order was required, despite the admitted fact the crossing signals at issue were activated. Mr. Clayson now has abandoned that position on appeal, but the record includes discussion as to both types of orders, and it must be remembered that at this crossing the signals were activated.

traveling 15 mph (if one were to assume it was traveling faster). Mr. Clayson's contention also assumes the URC train would not have had its lead locomotive go through the crossing at 15 mph, or less, without an XH Order, which is contrary to the undisputed fact that the train was in the process of slowing because it had to stop at the CP787 block signal just beyond the crossing. There is no evidence to dispute Engineer Booth's testimony that the train already was going 13 to 14 mph when the emergency brakes were applied. (R. 1238)

Even if it were conceded that the train should have been under an XH Order, that fact cannot be demonstrated to have been a cause of this accident. First, the train actually was moving at the same speed or less than the speed required by an XH Order (15 mph) at the time Mr. Clayson stepped in front of it. Second, the speed of the train cannot be a cause when someone steps in front of it at a point where the train cannot stop. Had the train been traveling only 5 mph, it still would have struck Mr. Clayson if he stepped in front of it at a point short of its stopping distance. To claim a slower speed would have prevented this accident is the same thing as saying it would have been prevented had Mr. Clayson walked in front of the train when it was farther away. It is not the train's speed, but rather Mr. Clayson's act of walking in front of it when it did not have time to stop that caused this accident.

Mr. Clayson also appears to advance the unpled theory of lack of training, but he does not explain or describe what training he supposedly requested before the accident or how any training he had not received would have altered the facts of the accident. Even on appeal he suggests no training, training courses or programs or changes in the

conditions of work which could have prevented or even affected his moving backwards onto a railroad track in front of an oncoming train, especially after he had been warned the track was active and the URC train was coming.[9] Mr. Clayson admits he had previously been trained that if he chose to go onto a track that was not protected he was to look and listen so that he would have at least 15 seconds to get off the track. No other training would have made any difference. The lack of training argument of Mr. Clayson also is not only unsupported by any evidence, it too is immaterial. No lack of training caused this accident.

FELA cases are subject to dismissal as a matter of law, just like other cases that require proof of at least some negligence causing an injury. Mr. Clayson's FELA claim against UPRR was properly rejected.

C. The District Court Properly Rejected Mr. Clayson's Common Law Negligence Claim

Mr. Clayson makes no legal argument or analysis pertaining to URC. He asserts in his discussion of facts only one serious claim against URC; allegedly, the engineer of the

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[9]Mr. Clayson cites only to the deposition transcript of UPRR's maintenance foreman which he attached to his brief. Therein, the foreman testified that because of the technical complexity of the signals in the area assigned to Mr. Clayson, more than one week of training on that area probably would be indicated for safety purposes. When asked to explain what he meant, he admitted Mr. Clayson certainly had the training and knowledge of how to get "track and time" authority and to obtain and comply with "lone worker permits" and to stay off of live tracks without first looking and listening for a train. (R. 1417-20 (¶ 27c), 1035, 1312-14) Obviously, Mr. Clayson (as any reasonable person) knew all he needed to know in order not to back onto the track in front of the URC train he knew was coming.

URC train did not sound the horn as the train approached the crossing at 1800 North.[10] (Aplt. Brief 6-7) Mr. Clayson ignores the undisputed evidence on the continuous sounding of the bell which is all that is required under Utah law. Utah Code Ann. § 56-1-14 (1975). Admittedly, not everyone recalled hearing the horn. Four witnesses distinctly heard the horn; four did not remember hearing it.

The trial court ruled that out of all of Mr. Clayson's theories against both defendants only the factual issue about the sounding of the horn could be material as to URC; but the negative evidence Mr. Clayson relied upon was insufficient to create a dispute. (R. 1513-14) The trial court, no doubt, relied upon a venerable line of Utah cases holding that the failure to hear a train's horn is not probative unless certain factual conditions and qualifications are met. Such negative testimony is not probative and cannot create a factual dispute if those conditions and qualifications are not met. Mr. Clayson ignores these Utah cases. A review of the cases and the testimony of the witnesses demonstrates that the trial court ruled correctly that the negative testimony of

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[10]Mr. Clayson's only other suggestion is that the train crew failed to go slower in compliance with an XH Order which he claims should have been given to the crew. This suggestion is ridiculous on its face. It also ignores the law that, because trains are heavy and confined to the tracks, pedestrians have the duty to stay off or get off tracks when trains are approaching, and train crews have the right to assume people will act reasonably and not step in front of moving trains. Consequently, regardless of train speed, train crews are required to brake and stop only when it is known or discoverable by the train crew that there is a pedestrian who cannot or will not stay off or get off the track. Lawrence v. Bamberger R. Co., 3 Utah 2d 247, 252, 282 P.2d 335, 338 (1955). See also Price v. National R.R. Passenger Corp., 2000 UT App. 333, ¶¶ 23-25, 14 P.3d 702, 708, cert. denied, 26 P.3d 235 (Utah 2001). Because Mr. Clayson stepped in front of the URC train when that train could not be stopped before hitting him, any train speed conclusion made against URC is immaterial for the same reasons discussed above with respect to the similar conclusion made against UPRR.

the four witnesses claiming not to hear the URC train horn was not probative and could not create a dispute so as to preclude summary judgment.

The Utah cases begin with Jensen v. Oregon Short Line R. Co., 59 Utah 367, 204 P. 101 (1922). The Utah Supreme Court held in Jensen that a person in position to hear a horn, but who was watching another passing train and not listening for the subject train, was not competent to give negative testimony that the horn on the subject train was not blown. 59 Utah at 376-77, 204 P. at 104-05. See also Humphreys v. Davis, 61 Utah 592, 217 P. 693, 694 (1923) (dicta, following Jensen, that negative testimony on sounding of signal would be insufficient to create a jury issue); Clark v. Union Pac. R. Co., 70 Utah 29, 257 P. 1050, 1053-55 (1927) (testimony probative where witnesses were outdoors where they could hear and had been specifically listening for a train whistle); Curtis v. Harmon Electronics, Inc., 575 P.2d 1044 (Utah 1978) (testimony probative where witnesses who had seen and were watching the train and who were speculating whether they would reach grade crossing before the train, and of witness outdoors at the corner of the grade crossing, all heard the train whistle only when the train was 300 feet and a few seconds from the crossing); Price v. Natl. R.R. Passgr. Corp., 2000 UT App 333, ¶¶ 27-31, 14 P.3d 702, 708-09, cert. denied, 26 P.3d 235 (Utah 2001) (witnesses near crossing but in automobile with windows rolled up and music playing were not competent to give testimony to avoid summary judgment).[11] Utah law provides that without a showing that

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[11]Recent decisions from other jurisdictions confirm that it continues to be well accepted law that negative whistle testimony does not create an issue of fact in the face of positive evidence the whistle was sounded. E.g., Parks v. CSX Transp., Inc., No. 2:02CV177, slip op. at 9-11 (N.D. Ind. Aug. 31, 2004) (included in Addendum)

the witness either was (1) actively listening for a horn from a position where it would be heard, or (2) or was situated where he or she would have to hear the horn and did not have his or her attention absorbed in other matters, then that witness' negative testimony is not probative.

The four witnesses relied upon by Mr. Clayson are: Ron Nash, Rebecca Cook, Rhett Cook and Einor Paulson. Mr. Clayson attaches to his brief severely truncated portions of the deposition testimony of each of the four witnesses. Under the Utah cases, these snippets of testimony do not address the critical qualifications, let alone establish any of the testimony as probative.

Ron Nash. Mr. Nash was not at the accident scene, but was speaking with Mr. Clayson over the telephone at a location about a mile from the crossing. He heard a "crackling noise" before Mr. Clayson's cell phone went dead. Mr. Nash offered no further testimony on the point. (See, supra, Statement of Facts) Mr. Clayson has not presented any evidence on acoustical factors, such as the barrier affect of the signal boxes and/or Mr. Clayson's body blocking sound waves or the electronic characteristics and limitations of Mr. Clayson's cell phone and Mr. Nash's land line phone. There also is no

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(excluding testimony of witness who was in automobile with windows rolled up and who was not listening for train horn); Mahoney v. Norfolk S. Ry. Co., No. IP 00-0620-C-G/T, 2001 U.S. Dist. LEXIS 18169 at *9-18 (S.D. Ind. Sept. 19, 2001) (included in Addendum) (excluding testimony of witness who was not attentive to the whistle, even when he testified he thinks he could have heard it, because such a belief creates only a possibility that is insufficient to create a genuine issue as to whether the whistle was sounded).

way to tell if the phone went dead before the train even started sounding its horn.[12]

Rebecca Cook. Mrs. Cook testified that she did not see the train hit Mr. Clayson. She did not know the train was coming. She was not paying attention. She was in a vehicle with its windows up, and she was talking with her husband while they waited at the intersection for the crossing gates to be raised during his lunch break. She and her husband were located approximately 100 feet east of the track, and were in the midst of semi trucks, that had their engines running, also waiting for the crossing gates to be raised. She said she was not listening for a train horn. (Id.)

Rhett Cook. Mr. Cook confirmed that he was talking to his wife in their car waiting for the crossing arms to raise. The windows were rolled up. He also believed that the heater was on and he probably had some hearing loss. He also said he was not listening for a train horn. (Id.)

Einor Paulson. Mr. Paulson was well over 200 feet northeast of the crossing. He is a UPRR electrician who was working in the bucket of a bucket truck which was stopped in a rail yard where semi trucks were picking up containers and trailers. He does not recall seeing the accident. He had no reason to listen for a train. The motor of the bucket truck was running. With the gates down at the 1800 North crossing, there was something of a traffic jam because of the trucks and trailers moving in and out of the yard. Those semi trucks also had their engines running. He said he was not listening for

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[12]Although Mr. Clayson was holding his cell phone to his ear at the time of the accident, we do not know that he was actually talking to Mr. Nash. The phone could have "crackled" and the cell phone signal interrupted seconds earlier and Mr. Clayson could have been trying to re-call Mr. Nash when the train began its whistle sequence.

a train horn. (Id.) Moreover, he is a railroad worker. He hears thousands of train horns a year. Unless he is close to some tracks, his mind is not likely to register one more train blowing a horn. This is confirmed by the fact that he also did not hear the sound of the train on the tracks, the train go into emergency (air rushing out), the sound of the brakes, or the slack action of the cars jarring to an emergency stop. The first thing he noticed that drew his attention to the train was the fact that it had stopped in a position where it blocked the crossing.

The negative testimony of each of these four witnesses fails to meet the articulated standard for probative evidence under the Utah cases. None was actively listening for the horn; several were far away and their attention was diverted, either by other activities and/or other noises. The Cooks were together in a car with the windows rolled up and the heater on, and Mr. Cook admits that his hearing is not the best. They were talking to each other during his lunch break. Mr. Paulson was further away in the bucket of his truck that had its engine running in order to operate the bucket. He was focusing on his work and did not even know there was an accident until he happened to see the train coming to a stop. Mr. Paulson and the Cooks were surrounded with semi trucks that also had their engines running. Mr. Nash was located far from the accident in his office, and was trying to talk with Mr. Clayson by telephone. None had focused their attention on hearing the horn of an oncoming train. They had no reason to listen for a horn. None were on or approaching railroad tracks. Under these facts, the law mandates that the negative testimony of these witnesses was not probative in the face of all the positive evidence that the horn was sounded. The particular negative testimony of the witnesses was immaterial

to the question of whether the horn was blown, and summary judgment on the point was appropriate.[13]

In addition, Mr. Clayson has admitted the fact that when he backed onto the track in front of the train he was not listening for a train horn or bell. He admits the facts that he pressed a cell phone to one ear and his hand over the other ear. The only reasonable inference is that he was trying not to hear external sounds, like the train bell and horn, while talking on the phone. It also is not disputed that the train brakes were applied before impact, and the only reasonable inference is that if the URC locomotive engineer was braking he also was sounding the horn. There can be no other reasonable conclusion than Mr. Clayson was trying to block out the URC train horn, or at least its bell, and did not pay attention or realize where he was backing. This is important because it is at least as probable that Mr. Clayson's own efforts to block out the horn and/or bell, or his distraction with his phone conversation and/or concentration on something else caused the accident rather than any lack of horn, regardless of whether or not it was sounded.

There also is evidence to infer that Mr. Clayson's abilities and senses were impaired so that he could not appreciate what he was doing. During discovery, defendants learned Mr. Clayson previously had been abusing opiate based narcotic pain medications since 1998. (R. 1447-96) In fact, a blood test of Mr. Clayson immediately after the accident was positive for opiates. (R. 1484-85) Mr. Clayson also admitted later to one health care provider that he began using cocaine in the form of speed balls together

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[13]For a detailed discussion of the testimony that the horn was sounded, see pages 17-21, supra.

with heroin in 2000. (R. 1495) (The accident was on December 4, 2000.) This too, in and of itself, is another explanation for his conduct regardless of whether the horn was sounded in addition to the bell.

Thus, even if there were probative evidence that the train horn was not sounded, it would be pure speculation to conclude the absence of the horn, rather than Mr. Clayson's covering his ears, his concentration on his phone conversation or something else, or the opiates in his system, proximately caused him to back onto a track in front of a train he knew was coming, and to do so without at least looking for that train. In such situations, plaintiffs are held as a matter of law to be unable to prove proximate causation. Mahmood v. Ross, 1999 UT 104, ¶ 22, 990 P.2d 933, 938. See also Mitchell v. Pearson Enterprises, 697 P.2d 240, 246 (Utah 1985) (affirming summary judgment where there was no evidence of a direct causal link between negligence and injury, quoting Stahlei v. Farmers' Coop. of So. Utah 655 P.2d 680, 684 (Utah 1982) (summary judgment dismissing a claim is proper "[w]hen the proximate cause of an injury is left to speculation")); Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445 (Utah App. 1989) (summary judgment affirmed where the plaintiff had no evidence to prove any particular cause of her accident).

Summary judgment should be granted where there is no material question of fact. Id; see also Clark v. Farmers Ins. Exch., 893 P.2d 598, 600-01 (Utah App. 1995) (summary judgment affirmed in absence of evidence to prove proximate cause). Like the plaintiff in Dybowski, Mr. Clayson has no recollection of what happened as he approached the track a second time. He testified it was possible for him to look and listen

for a train, as he previously had done, but he does not recall doing so. There is no evidence he looked for a northbound train or listened for a horn. The evidence is unrefuted that the train bell was sounding and Mr. Clayson actively tried not to hear outside sounds by covering his ears. It not only would be speculation to conclude the lack of a train horn caused his accident, such a conclusion would be contrary to undisputed evidence and any reasonable inference. The trial court's rejection of Mr. Clayson's common law claim against URC also was proper.

D. This Court Should Ignore Mr. Clayson's Conclusions that are Unsupported by Citations to Evidence of Record; Mr. Clayson Also Has Failed to Comply with the Marshaling Requirement of Rule 24(a)(9) of the Utah Rules of Appellate Procedure on the Alleged Failure of the Train Horn

Mr. Clayson did not cite for the trial court and has not cited for this Court evidence in the court record to support his various factual assumptions underlying the conclusions being asserted on appeal. Summary judgment is warranted where a party opposing summary judgment fails to provide evidence of the purported factual grounds for its position. Utah R. Civ. P. 7(c)(3)(B); Gary Porter Const. v. Fox Const., Inc., 2004 UT App 354, ¶¶ 12-15, 101 P.3d 371, 375-77. The trial court did not expressly rule on whether summary judgment was warranted for Mr. Clayson's failure to comply with this rule. However, there was a complete absence of all necessary citations to actual evidence in the record, and there is nothing that prevents this Court from affirming the trial court's grant of summary judgment for this alternative reason.[14] Likewise, the rules of appellate

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[14]Bailey v. Bayles, 2000 UT 58, ¶ 10, 52 P.3d 1158, 1161 ("It is well settled that an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from

procedure require citation to evidence of record. Utah R. App. P. 24(a)(7) and (e). This Court should assume the correctness of the judgment when there is no citation to the pages in the record to support stated facts. Koulis v. Standard Oil Co. of California, 746 P.2d 1182, 1184-85 (Utah App. 1987); Steele v. Board of Review of Indus. Com'n of Utah, 845 P.2d 960, 961-62 (Utah App. 1993). Thus, an appeal may be dismissed for failure to comply. Thurston v. Worker's Comp. Fund of Utah, 2000 UT App 483, ¶ 1 n.1, 83 P.3d 391 n.1 ("We have the discretion to dismiss this appeal and assess attorney's fees against Plaintiffs due to their failure to . . . 'make a concise statement of the facts and citation of the pages in the record where those facts are supported,'" as required by Utah R. App. P. 24(a)(7)). Mr. Clayson's repeated failure to support his factual assumptions with citations to admissible evidence should be determinative of this appeal in and of itself.

Moreover, the trial court found immaterial the testimony of the witnesses who claimed not to have heard the horn. The trial court's ruling was premised on the factual resolution of what these witnesses said with respect to where they were, what they were doing and whether they were listening for a train horn. If Mr. Clayson now challenges that ruling and its underlying factual premise, he must comply with Rule 24(a)(9) of the Utah Rules of Appellate Procedure, which requires in part: "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Mr.

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that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.'" (citations omitted)).

Clayson has the obligation to marshal and present in a light most favorable to the trial court's ruling all the pertinent evidence from witnesses who did hear the horn, and from each witness claiming not to have heard the horn. At a minimum, his brief should have addressed the location and proximity of each witness to the accident, and whether and to what extent each witness was capable of hearing, was engaged in attention diverting activities or was actively listening for the horn.

Mr. Clayson's brief meets none of these marshaling requirements. Mr. Clayson contented himself with short, highly selective, and rather misleading excepts from deposition testimony attached to his brief. Challenged legal conclusions based on factual determinations are subject to marshaling of the supporting facts, and failure to comply with the marshaling requirement allows this Court to "leave undisturbed the court's findings and the conclusion based thereon." West Valley City v. Majestic Inv., Co., 818 P.2d 1311, 1315 (Utah App. 1991). This Court described Mr. Clayson's duty as follows:

> The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of the fatal flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." (Id. (emphasis in original).)

Mr. Clayson failed to comply with this duty and "first marshal all the evidence in support of the finding and then to demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Wilson

Supply, Inc. v. Fraden Mfg. Corp., 2000 UT 94, ¶ 21, 54 P.3d 1177, 1183. This Court can affirm on this basis alone. Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051 (Utah App. 1994); Utah Med. Prods. Inc. v. Searcy, 958 P.2d 228 (Utah 1998); In re Estate of Bartell, 776 P.2d 885 (Utah 1989).

Mr. Clayson's failure to marshal is particularly egregious. He is asking this Court, essentially, to reverse the long line of Utah cases which have delineated the rules for determining whether negative testimony is probative. Though it is not explicitly stated, Mr. Clayson's argument is that wherever any witness can be found that did not hear a train horn, despite the factual context of such testimony summary judgment is inappropriate. Thus, the testimony of a person ten miles away who did not hear a whistle would preclude summary judgment. This position eliminates the judicially required inquiry into the factual conditions and qualifications of the proferred negative testimony. By his failure to marshal, Mr. Clayson precludes this Court from any meaningful analysis of whether the trial court's resolution of the issue agrees with prior Utah precedent. He is asking this Court to perform the exercise of reviewing the record to glean for itself what undisputed facts were before the trial court that were neglected by Mr. Clayson that could have caused the trial court to conclude Mr. Clayson's negative testimony was not probative.

Mr. Clayson should not be allowed to advance arguments without citations to supporting evidence or challenge the trial court's factually premised evidentiary conclusions without marshaling. Neither the Court nor defendants should be compelled to do Mr. Clayson's job for him in order to address such arguments and evidence. If these

rules have any meaning, they should be strictly enforced, as a matter of law, out of fairness to the defendants. Mr. Clayson's appeal should be dismissed for these reasons alone.

CONCLUSION

Mr. Clayson has not shown that there is a genuine issue of a material fact, properly supported by admissible evidence in the record, or that the trial court misapplied any controlling law applicable upon the undisputed facts of this case. Defendants request that the Judgment in their favor be affirmed, that Mr. Clayson's appeal be dismissed, and that costs and fees be awarded to defendants.

DATED this 1st day of April, 2005

BERMAN & SAVAGE, P.C.
E. Scott Savage
Casey K. McGarvey

Attorneys for Defendants/Appellees Union Pacific Railroad Company and Utah Railway Company

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2005, I caused true and correct copies of the within and foregoing **BRIEF OF DEFENDANTS/APPELLEES UNION PACIFIC RAILROAD COMPANY and UTAH RAILWAY COMPANY** to be mailed, postage prepaid, to the following:

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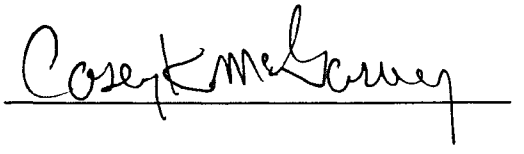

ADDENDUM

The following two cases are included here for the convenience of the Court:

1. Parks v. CSX Transp., Inc., No. 2:02CV177 (N.D. Ind. August 31, 2004);

and

2. Mahoney v. Norfolk, S. Ry. Co., No. IP 00-0620-C-GIT, 2001 U.S. Dist. LEXIS 18169 (S.D. Ind. Sept. 19, 2001)

Tab 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

SCOTT D. PARKS, for himself and as Administrator of the Estate of Deborah Colleen Parks, Deceased and as Surviving Parent of Lindsey Parks Deceased, Plaintiff,	)	
v.	)	Cause No. 2:02 CV 177
CSX TRANSPORTATION, INC., and NATIONAL RAILROAD PASSENGER CORPORATION (Amtrak), Defendants.	)	

MEMORANDUM OPINION AND ORDER

This case arises out of a railroad grade crossing accident in which plaintiff's wife and daughter were killed after the van in which they were riding was struck by a passenger train operated by defendant National Railroad Passenger Corporation ("Amtrak"). The grade crossing at issue was owned and maintained by defendant CSX Transportation, Inc. This matter is presently before the Court on the Defendants' joint motion for partial summary judgment (Docket No. 37). For the reasons stated below, the motion is GRANTED.

FACTUAL BACKGROUND

On Friday, November 24, 2000, at approximately 7:40 am, Deborah Parks was driving a 1994 Chevrolet Astro Minivan eastbound on West 113th Avenue in Lake County, Indiana. Her daughter, Lindsey Parks, was a passenger in the van. West 113th Avenue intersects with CSX's Railroad Crossing No. 341154B ("the crossing") just west of Parish Avenue in Hanover Township. At the time of the accident, the crossing was clearly marked in four ways: 1) well before the grade crossing there was a circular yellow sign with the commonly used railroad

crossing symbol; 2) pavement markings; 3) a stop sign; and 4) a reflectorized crossbuck sign. The crossbucks are white crisscrossed boards with the words "RAILROAD CROSSING" in black lettering. The markings on the pavement are large white markings with the universal symbol for an approaching railroad crossing.

According to the complaint, on the morning in question, as Ms. Parks drove over the grade crossing, an Amtrak train with two locomotives going in excess of 80 mph and traveling in a northerly direction struck the minivan in which Ms. Parks was driving. As a result of the collision, the minivan was pushed down the tracks and came to rest approximately 169 feet north of the crossing. Ms. Parks and her daughter Lindsey were ejected from the van, and both died in the accident. Defendants contend that the train was actually traveling at a speed of 77 mph which is less than the 80 mph speed limit. This contention is supported by data retrieved from the event data recorder, which shows that for the twenty minutes prior to the accident, the train never exceeded the speed limit.

Plaintiff filed this diversity action alleging that CSX and Amtrak were negligent under Indiana law in a number of ways including: 1) by failing to sound its whistle and ring its bell as it approached the crossing; 2) by operating the train in excess of 80 mph, the speed limit for passenger trains; and 3) by failing to install active warning signals, flashers and gates at the crossing. Defendant CSX moved for partial summary judgment claiming that any allegation of negligence in its failure to install gates and flashing warning signals was preempted by federal law. Defendant Amtrak also moved for summary judgment on Plaintiff's claim of excessive speed, arguing that the undisputed evidence shows the train was never traveling more than 77 mph, and thus was not in excess of the federally mandated speed limit.

On September 10, 2003, this Court granted the Defendants' motions because any claim for a negligent crossing was preempted by Federal law and there was no evidence to suggest that Amtrak was operating its train too fast. The following day, on September 11, 2003, a pretrial hearing was held. During this hearing Plaintiff submitted that additional discovery was needed to verify whether in fact the train was traveling less than 80 mph and for the event recorder data going back to the beginning of the train's journey from Indianapolis. The Court allowed the additional discovery and ordered the parties to rebrief – to the extent necessary – the issue of the train's speed after the completion of the discovery. Additional discovery was taken and the issue of the train's speed is now back before the Court on Amtrak's renewed motion for partial summary judgment.

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment initially carries the burden of demonstrating an absence of evidence to support the position of the non-moving party. *Doe v. R.R. Donnelley & Sons, Co.*, 42 F.3d 439, 443 (7th Cir. 1994). The non-moving party must then set forth specific facts showing there is a genuine issue of material fact and that the moving party is not entitled to judgement as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). A genuine dispute about a material fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

In ruling on a motion for summary judgment, the Court must draw every reasonable inference from the record in the light most favorable to the non-moving party. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). However, the non-moving party must support its contentions with admissible evidence and may not rest upon mere allegations in the pleadings or conclusory statements in the affidavit. *Celotex*, 477 U.S. at 324.

I. The Speed of the Train

As this Court previously held, the Federal Railroad Safety Act (FRSA) is a comprehensive system of railroad safety regulations the goal of which is to "promote safety in every area of railroad operations and to reduce railroad related accidents and incidents." 49 U.S.C. § 20101. The FRSA has covered the field of train operating speeds through the implementation of 49 C.F.R. § 213.9(a). *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993). In that regulation, the Secretary of Transportation has established maximum allowable operating speeds for freight and passenger trains for each class of track on which they travel.

In *Easterwood*, the plaintiff alleged that the railroad was negligent for operating its train at a speed that was too fast for the conditions. The Court noted that the federal speed limits were adopted "only after the hazards posed by track conditions were taken into account" and thus "must be read not only as establishing a ceiling, but also precluding additional state regulation of the sort that [plaintiff] seeks to impose on the [railroad]." *Id.* at 674. Thus, *Easterwood* held that the "federal regulations adopted by the Secretary of Transportation pre-empt [plaintiff's] negligence action ... insofar as it asserts that [the] ... train was traveling at an excessive speed." *Id.* at 676.

The track in question in this case is a class 4 track pursuant to the designations of the

Federal Railroad Administration as set forth in 49 C.F.R. § 213. The maximum allowable operating speed for a class 4 track is 60 mph for freight trains and 80 mph for passenger trains. After allowing the parties to conduct additional discovery, it remains clear to the Court that the undisputed evidence shows that the train was not being operated in excess of the 80 mph speed limit set by regulation. According to the uncontroverted deposition testimony of Greg Aronson, the Amtrak engineer who was operating the train, the train was going 77 mph prior to the accident.

The data from the event recorder corroborates Aronson's testimony. The Defendants downloaded the event recorder in two forms. The first is a graphic read-out which shows a continuous monitoring of the train. According to the deposition testimony of George Warren, this graphic read-out is a continuous reading of the movement and functions of the train and would have indicated had the train exceeded 80 mph in the moments preceding the accident. The other bit of data is known as a table read-out which was downloaded in five second intervals. The graphic data, as well as the five second read-out, indicates that the train was not exceeding 80 mph at the time of the accident.

Plaintiff presents nothing in contravention of Defendants' evidence and instead merely argues that two acts of spoliation of evidence have occurred and urges the Court to make an adverse inference against the Defendants with respect to this missing evidence. First, Plaintiff complains that the Defendants failed to download the event recorder from the lead locomotive until more than twenty-four hours after the accident. This delay resulted in the data, which had been recorded in one second intervals, being taped over and leaving only data recorded in five second intervals preserved. Second, Plaintiff complains that the data from a recorder on the

second locomotive for the train was never downloaded.

To impose the sanction of an evidentiary presumption adverse to the Defendants on the basis of spoliation of evidence as Plaintiff urges, it must be found both that (1) the missing evidence was likely unfavorable to the responsible party and (2) the loss of the records was willful or in bad faith. *S.C. Johnson & Son, Inc. v. Louisville & Nashville R. Co.*, 695 F.2d 253, 258-59 (7th Cir. 1982); *see also Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998). In this context, "'bad faith' means destruction for the purpose of hiding adverse information." *Mathis*, 136 F.3d at 1155. There is nothing before the Court to suggest the failure to download the event data recorder in one second intervals or to download the data from the recorder located on the second locomotive was in bad faith or was done to hide adverse evidence. First, the accident occurred on the day after Thanksgiving in November of 2000, a day when many employees of Amtrak were understandably on vacation. As a result, the people and equipment required to download the event data recorder were not immediately available and the Defendants were unable to download the information from the recorder until the next morning.

Further, any suggestion of bad faith or that the missing data contained information adverse to the Defendants is belied by the information contained in the graphic read-out. The undisputed evidence before the Court shows that the graphic read-out provides the same information that would have been available had the data-table read-out been downloaded in one second intervals. This graphic read-out shows that the train did not exceed 80 mph in the 20 minutes prior to the accident. Thus, there is nothing before the Court to support an adverse inference against the Defendants based on spoliation of evidence.

Plaintiff next offers – as it relates to the train's speed -- an attenuated argument of

causation. It is true that the train traveled in excess of 80 mph on four occasions after leaving the City of Lafayette. Plaintiffs contend that because of these earlier violations of the speed regulations, Defendants are legally at fault for the collision. Specifically, Plaintiff argues that if the train had not reached speeds in excess of 80 mph on four occasions, the last of which occurred approximately 20 minutes before the accident, the train would not have reached the van at the exact time that it was crossing the tracks.

Plaintiff attempts to stretch the concept of legal causation much too far. While the speed of the train at a remote point in time may be a philosophical cause of the collision, it is not a legal cause. *See Mister v. Illinois Cent. Gulf R. Co.*, 790 F. Supp. 1411, 1419 (S.D. Ill. 1992); *see also Bartlett v. Kansas City Southern Railway Co.*, 854 S.W.2d 396, 400 (Mo. 1993). Plaintiff's argument is that the train's speed at a remote point in time caused the train to be at the scene of the accident at the same time Ms. Parks was crossing the tracks and therefore this makes the Defendants liable. This theory would leave causation entirely open-ended, allowing evidence of a train's speed over an infinite number of prior travels. *See Mister*, 790 F. Supp. at 1419. Moreover, suppose, for example, that the train's conductor was late for work that morning and ran three red lights to ensure a timely departure of the train. While his running of the red lights could be viewed as the metaphysical cause of the accident, it would not be the legal cause. This is because legal responsibility is limited to those causes which are so closely connected with the result and of such significance that liability is justified. *Id.*

The law in Indiana on proximate cause supports this. The appropriate assessment of legal, proximate causation is based on determining whether the Defendants' act or omission set in motion a chain of events that resulted in an injury that was reasonably foreseeable as the

natural and probable consequence of the act or omission. *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003); *Adams Township of Hamilton Cnty v. Sturdevant*, 570 N.E.2d 87, 89-90 (Ind. Ct. App. 1991) (noting that while the question of proximate causation is normally for a jury to decide, summary judgment appropriate where only a single conclusion be drawn). Moreover, even though a defendant may have originally set in motion a chain of events that led to an injury, that chain can be severed by a separate intentional or negligent act. *Bush v. N. Indiana Pub. Serv. Co.*, 685 N.E.2d 174, 178 (Ind. Ct. App. 1997). The original act then becomes a remote cause and the subsequent act becomes the proximate cause. *Id.* The issue of superseding cause under Indiana law has been described as follows:

> Under common law, independent intervening conduct precludes the original wrongdoer's liability when the later conduct constitutes a cause interrupting the natural sequence of events turning aside their course, preventing the natural and probable result of the original act or omission, and producing a result that could not have been reasonably anticipated.

Correll v. Indiana Dep't of Trans., 783 N.E.2d 706, 708 (Ind. Ct. App. 2003) (quoting *Richardson v. Salaam*, 726 N.E.2d 888, 892 (Ind. Ct. App. 2000)). Thus, to constitute an intervening cause, "the intervening conduct must be an independent act which interrupts the natural consequence of the events." *Id.*

While the event data recorder shows that the speed of the train exceeded 80 mph on several occasions on the day of the accident, the last time the train exceeded 80 mph was approximately 20 minutes before the accident. In these last 20 minutes before the accident the event data recorder shows that the train traveled at a number of speeds under 80 mph. And each moment the train traveled less than 80 mph altered the time at which the train would arrive at the site of the accident. In other words the varying speeds of the train – all under 80 mph – in the

last 20 minutes operated as independent events that interrupted the natural and probable consequence of the train previously traveling above 80 mph. Thus, the only speed that is relevant to the issue of proximate cause is the speed of the train just prior to the accident and at the time of the collision.

In this case, the undisputed evidence before the Court, including the uncontroverted deposition testimony of Greg Aronson and the event data recorders, demonstrates that in the 20 minutes prior to the accident the train was traveling within the maximum allowable operating speed for a class 4 track. Accordingly, Plaintiff's claim relating to the issue of the train's alleged excessive speed fails as matter of law.

II. The Train Whistle and Bell

Plaintiff alleges that the crew failed to sound the train whistle and ring its bell in the manner required by I.C. § 8-6-4-1 and by company rules. These regulations mandate that when crossing an intersection like CSX's Railroad Crossing No. 341154B, a train must, when one-fourth of a mile from the crossing, sound the engine whistle at least four times, prolonging or repeating the sounding until the crossing is reached, as well as ring the bell attached to the engine continuously from the time of the sounding of the whistle until the train has passed the crossing. I.C. § 8-6 4-1. Greg Aronson, the train engineer, testified that he sounded the whistle and rang the bell well before the intersection and that he blew the horn repeatedly over the entire distance. In addition, the graphic read-out of the event recorder reflects that the whistle was blown for the statutorily prescribed period of time prior to impact.

Plaintiff contends that the testimony of a third party witness, Lori Stolarz, creates questions of material fact whether the whistle had been sounded properly. Specifically, Ms.

Stolarz testified that she does not recall hearing the whistle sound when she was backing out of her driveway with the windows rolled up and when Ms. Stolarz admittedly was not paying attention. The Court is unconvinced. Such negative testimony – that one does not recall hearing something – does not create an issue of fact in the face of affirmative evidence that the whistle was sounded several times. *See, e.g., Unterriener v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1210-11 (7th Cir. 1993) (negative testimony that one did not recall seeing a notice posted on bulletin board was not enough to create an issue of fact in the face of affirmative evidence that notice was posted); *see also Bocock v. Wabash R. Co.*, 171 F.2d 834, 836 (7th Cir. 1949) (noting that testimony from a witness that he or she did not hear a whistle or bell when not in close proximity or paying attention is merely negative and does not raise an issue of fact as to whether the whistle or bell was sounded); *see also Tr. Co. of Chicago v. Erie R. Co.*, 165 F.2d 806, 809 (7th Cir. 1948) (same); *Mahoney v. Norfolk & Southern Railway Co.*, 2001 WL 1386086, *4 (S.D. Ind. Sept. 19, 2001) (discussing Seventh Circuit's treatment of negative testimony).

Plaintiff again raises the issue of spoliation of evidence because Defendants did not download the one second interval data or the data from the second locomotive. However, as discussed above, there is nothing before the Court that this evidence was destroyed in bad faith. Moreover, any suggestion that the missing information may have been adverse to the Defendants is contradicted by the graphic read-out which shows that the whistle was being blown properly. Accordingly, the Court finds that Plaintiff is not entitled to any adverse inference based on spoliation of evidence that the whistle was not in fact sounded.

Because Plaintiff has presented no evidence to create a genuine issue of material fact relating to the sounding of the whistle and bell, Plaintiff's claim for failure to sound the whistle

fails as a matter of law.

CONCLUSION

Plaintiff has failed to raise any questions of material fact that the train was traveling more than 80 mph just prior to the accident or that the Defendants failed to sound the whistle and bell. As a result, Defendants' Motion for Partial Summary Judgment (Docket No. 37) is **GRANTED**.

SO ORDERED.

ENTER: August 31, 2004

S/ Philip P. Simon
Philip P. Simon, Judge
United States District Court

Tab 2

PHILLIP MAHONEY and SHARON MAHONEY, Plaintiffs, vs. NORFOLK SOUTHERN RAILWAY COMPANY, Defendant.

IP 00-0620-C-G/T

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

2001 U.S. Dist. LEXIS 18169

September 19, 2001, Decided

NOTICE:
[*1] NOT FOR PUBLICATION

DISPOSITION:
Defendant's motion for summary judgment was granted. Defendant's verified motion to strike plaintiffs' surreply was granted in part.

COUNSEL:
For MAHONEY, PHILLIP, MAHONEY, SHARON, plaintiffs: JOHN TOWNSEND, JR, TOWNSEND & MONTROSS, INDIANAPOLIS, IN.

For NORFOLK & SOUTHERN RAILWAY COMP, defendant: DAVID A LOCKE, STUART & BRANIGIN, LAFAYETTE, IN.

JUDGES:
John Daniel Tinder, Judge, United States District Court.

OPINIONBY:
John Daniel Tinder

OPINION:

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND VERIFIED MOTION TO STRIKE SUMMARY JUDGMENT SURREPLY n1

n1 Though this entry is being made available to the public on the court's web site, it is not intended for commercial publication either electronically or in paper form. Under the law of the case doctrine, it is presumed that the ruling or rulings in this entry will govern throughout the litigation before this court. *See, e.g., Tr. of Pension, Welfare, & Vacation Fringe Benefit Funds of IBEW Local 701 v. Pyramid Elec., 223 F.3d 459, 468 n.4 (7th Cir. 2000); Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1227 (7th Cir. 1995).* It should be noted, however, that this district judge's decision has no precedential authority and, therefore, is not binding on other courts, other judges in this district, or even other cases before this district judge. *See, e.g., Howard v. Wal-Mart Stores, Inc., 160 F.3d 358, 359 (7th Cir. 1998)* ("a district court's decision does not have precedential authority"); *Malabarba v. Chicago Tribune Co., 149 F.3d 690, 697 (7th Cir. 1998)* ("district court opinions are of little or no authoritative value"); *Old Republic Ins. Co. v. Chuhak & Tecson, P.C., 84 F.3d 998, 1003 (7th Cir. 1996)* ("decisions by district judges do not have the force of precedent"); *Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995)* ("District court decisions have no weight as precedents, no authority.").

[*2]

Plaintiffs Phillip Mahoney and Sharon Mahoney bring this action against Defendant Norfolk Southern Railway Company, alleging that Defendant was negligent in the operation of a locomotive which collided with a motor vehicle driven by Mr. Mahoney, thus

causing them damages. Defendant moves for summary judgment and moves to strike Plaintiffs' surreply to the motion for summary judgment. The court has carefully considered the motions, the record and applicable law and rules as follows.

I. Motion for Summary Judgment

A. Legal Standard

Summary judgment is proper only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* The moving party bears the burden of informing the court of the basis for its motion and demonstrating the "absence of evidence on an essential element of the non- moving party's case," *Celotex Corp., 477 U.S. at 323, 325.* To withstand a motion for summary judgment, the non-moving party may not simply rest on the pleadings, **[*3]** but rather must "make a showing sufficient to establish the existence of [the] element[s] essential to that party's case, and on which that party will bear the burden of proof at trial. ..." *Celotex Corp., 477 U.S. at 322.* If the non-moving party fails to make this showing, then the moving party is entitled to judgment as a matter of law. *Celotex Corp., 477 U.S. at 323.*

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party. *Nat'l Soffit & Escutcheons, Inc. v. Superior Sys., Inc., 98 F.3d 262, 264 (7th Cir. 1996).* No genuine issue exists if the record viewed as a whole could not lead a rational trier of fact to find for the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Ritchie v. Glidden Co., 242 F.3d 713, 720 (7th Cir. 2001).* When ruling on a motion for summary judgment, the court cannot make credibility determinations, weigh the evidence or draw inferences from the evidence. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986);* **[*4]** *Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374, 379 (7th Cir. 2000).*

B. Facts

This case arises out of a pickup truck-train accident that occurred east of the railroad grade crossing on State Road 1 near Hagerstown, Indiana on June 10, 1998, at about 6:00 A.M. Just prior to the accident, Plaintiff Phillip Mahoney had been northbound on State Road 1 and the train was generally westbound toward Hagerstown. The accident occurred in foggy conditions. These conditions were general or widespread. When Mr. Mahoney left his home at Hagerstown earlier that morning around 5:00 A.M., the weather was very foggy and visibility was extremely limited. At around 6:00 A.M. when Mr. Mahoney headed toward the grade crossing, visibility in the fog was about the same as it had been when he left home earlier that morning. Because of the foggy and humid conditions, the asphalt surface of State Road 1 was damp or wet at the time of the accident. The windows of Mr. Mahoney's pickup truck were rolled up and he "probably" had his air conditioner on, "would say" he had his windshield wipers turned on, and "thinks" he was listening to the radio.

On the day of the accident there was **[*5]** a yellow and black railroad advance warning sign and white railroad advance pavement markings south of the crossing to warn northbound motorists they were approaching a railroad crossing. Mr. Mahoney does not recall seeing either the advance warning sign or the advance pavement markings as he drove north on State Road 1; the sign and pavement markings were obscured by the foggy conditions. In addition to the advance warning devices and the normal "crossbuck" railroad signs marking the location of the tracks, the grade crossing was equipped with automatic, train-activated warning devices that included two flashing light signals at the crossing, four overhead flashing light signals mounted on cantilever arms, two crossing gates with three warning lights mounted on the top of each gate, and a crossing warning bell.

At the time of the accident, the train was being operated by student engineer, Chris L. Morris, who was seated at the control stand on the left-hand (south) side of the lead locomotive. Engineer John F. Martin, Jr. was positioned in the front seat on the right-hand (north) side of the lead locomotive, and Conductor Geoffrey A. Wood was seated behind Martin in the second seat **[*6]** on the right-hand side. As the train approached the crossing, the train crew was able to see the flashers operating and the crossing gates down. At the time of the accident, the train was traveling approximately 53 m.p.h.--well below the federally prescribed 60 m.p.h. speed limit for that stretch of tracks. The lead locomotive's headlight was on full bright and the auxiliary "ditch" lights were activated as the train approached the crossing.

At the whistle post approximately a quarter of a mile east of the crossing, Engineer Morris turned on the engine bell and began sounding the warning whistle

sequence required by the Railway's Operating Rules--two long blasts followed by a shorter blast and then a last long blast up to the crossing. Due to the foggy conditions, Morris extended the whistle blasts for longer than normal as the train approached State Road 1, sounding two longer "longs" and a longer "short" before sounding the last "long" up to the crossing. Both the whistle and engine bell were operating at the normal volume level.

Mr. Mahoney traveled daily on State Road 1, was familiar with the railroad crossing and knew that it was an active railroad line. He was not consciously [*7] aware that he was approaching the railroad crossing at the time of the accident. When he approached the crossing in the fog and realized the flashers were operating and the gates were down, he did not bring his pickup truck safely to a stop. Instead, he locked up his truck's brakes and skidded off the east side of the road, traveling through a shallow ditch behind the flasher station and up onto the railroad tracks east of the railroad crossing. Because the westbound train was just about to enter the crossing when Mr. Mahoney's truck came to rest on the tracks east of the crossing, there was no time for the crew to take any action (other than sounding the whistle) to try to avoid a collision. Both Mr. Morris and Mr. Wood made a full emergency brake application and, following the collision, Mr. Wood radioed for emergency assistance. Shortly after the accident, Signal Maintainer Rick Davis tested and inspected the crossing warning devices and confirmed that all components of the warning system were operating as intended.

On August 17, 2000, the court approved the parties' joint stipulation of dismissal with prejudice of all claims relating to the State Road 1 grade crossing.

C. [*8] Discussion

Norfolk contends it is entitled to summary judgment on the claim that it was negligent in the operation of the locomotive as the sole allegation is that the crew failed to sound the train whistle in violation of the law. In the alternative, it argues that the undisputed evidence establishes that the accident was caused solely by Plaintiff's negligence, or at a minimum, that Plaintiff's fault was greater as a matter of law than any fault attributable to Norfolk. Norfolk also contends that there is no issue of material fact as to whether it negligently trained its crew members and such an allegation is not made in the Complaint. n2 It argues that even if the Complaint contained such an allegation, it would be preempted by federal law.

n2 The court does not understand Plaintiffs to be asserting a claim against Defendant based on a negligent failure to train. This understanding is supported by the fact that Plaintiffs have not designated any evidence in response to the motion for summary judgment as to a negligent failure to train claim.

[*9]

Plaintiffs allege that Norfolk was negligent because the train's crew negligently failed to sound the whistle as the train approached the grade crossing. Indiana law mandates, with an exception not applicable here, that:

the engineer or other person in charge of or operating an engine upon the line of a railroad shall, when the engine approaches the crossing of a ... public highway, or street in this state, beginning not less than one-fourth (1/4) mile from the crossings:

(1) sound the whistle on the engine distinctly not less than four (4) times, which sounding shall be prolonged or repeated until the crossing is reached; and

(2) ring the bell attached to the engine continuously from the time of sounding the whistle until the engine has fully passed the crossing.

IND. CODE § 8-6-4-1(a). Defendant has presented evidence, namely the affidavit testimony of the crew members, that Engineer Morris sounded both the engine bell and warning whistle at the whistle post approximately 1/4 mile east of the State Road 1 grade crossing, sounded the whistle in compliance with the Railway's Operating Rules, and even extended the whistle blasts longer than normal because of the **[*10]** foggy conditions. Defendant has offered evidence that the whistle and engine bell operated at the normal volume level.

Plaintiff contends there is a genuine issue as to whether the train crew sounded the whistle and relies on his testimony and an affidavit of Jonathan Scudder for evidentiary support. During his deposition Mr. Mahoney testified that he did not recall hearing the whistle:

Q. Do you recall hearing a whistle from the train?

A. No.

Q. I believe you testified earlier that your windows were up, that you would have had, probably would have had

your air conditioning on and to help with defrosting the windshield. I think that you also testified that you were listening to one of the Christian stations, probably music, as you drove north on State Road 1. In light of those kinds of background noises that we've established, is it possible that the crew could have sounded the whistle and you didn't hear it?

A. I wouldn't think so, you know. I can hear the whistle from my house in my bedroom two miles away.

(Mahoney Dep. at 124.) Thus, Plaintiffs offer Mr. Mahoney's negative testimony that he does not recall hearing the train whistle.

The Seventh Circuit **[*11]** has held that to be probative and admissible, negative testimony of a witness that he did not hear a whistle or bell must meet two requirements: (1) the witness must be in a position to have heard the whistle or bell, and (2) the witness must have been attentive to the whistle or bell. *See, e.g., Wheat v. Baltimore & Oh. R.R. Co., 262 F.2d 289, 293 (7th Cir. 1959)* (affirming grant of judgment notwithstanding the verdict to defendant railroad); *Bocock v. Wabash R. Co., 171 F.2d 834, 836 (7th Cir. 1949)* (holding witnesses' testimony that they did not hear the train's whistle did not create factual question as to whether the whistle was sounded where evidence did not establish that witnesses were in proximity to hear the whistle or attentive to the whistle); *Tr. Co. of Chicago v. Erie R. Co., 165 F.2d 806, 809 (7th Cir. 1948)* (holding witness's testimony that he did not hear any train signals when he was not paying attention for signals was not probative of whether signal had been given); *Stephenson v. Grand Trunk W. R. Co., 110 F.2d 401, 408 (7th Cir. 1940)* (holding no evidence supported claim that no bell or whistle **[*12]** was given; "Testimony of a witness that he did not hear, without any proof that he was listening and in a position to hear, can carry no weight, especially in the face of positive and direct evidence to the contrary."); *Pere Marquette Ry. Co. v. Anderson, 29 F.2d 479, 479-80 (7th Cir. 1928)* (holding negative testimony that whistle and bell were not sounded by witnesses not in position to hear whistle and bell and not attentive to whether they were given did not create conflict in evidence with positive testimony of train crew that whistle and bell were sounded); *cf. United States v. Laughlin, 772 F.2d 1382, 1394 (7th Cir. 1985)* (district court abused its discretion in prohibiting witness from testifying that he did not hear defendant's inculpatory statement where court assumed witness was in a position to overhear the statement if made). Other jurisdictions are in accord. *See Bryan v. Norfolk & W. Ry. Co., 154 F.3d 899, 901-02 (8th Cir. 1998)* (holding affidavits from witnesses living near railroad crossing not admissible to prove crew did not sound whistle to warn of train's approach where witnesses testified they had not been attentive **[*13]** to whether or when train whistle blew and one witness may not have been in a position to hear the whistle); *Chicago & N.W. Ry. Co. v. Golay, 155 F.2d 842, 846 (10th Cir. 1946)* (holding witnesses' testimony that they did not hear whistle or bell was sufficient to get case to jury where witnesses were alert and vigilant in watching and listening for approaching trains and were so situated that in all probability would have heard the whistle or bell had it been given); *Sharer v. The Atchison, Topeka & Santa Fe Ry. Co., 1992 U.S. Dist. LEXIS 7224,* No. 91 C 3585, *1992 WL 107298,* at *8-9 (N.D. Ill. May 14, 1992) (denying plaintiff's motion for summary judgment on claim that defendant negligently failed to sound whistle or horn despite witness's testimony that she did not hear a whistle, bell or horn, where witness testified she was not paying attention and other noise may have made it too loud for her to hear).

Mr. Mahoney's deposition testimony establishes that he was not attentive to the train whistle or bell:

Q. Did it occur to you during that drive up to the crossing that you were approaching a railroad crossing?

A. No. Very seldom, as I had stated earlier, very seldom **[*14]** did I encounter a train at that particular time when I was driving that. And that didn't occur to me. I was thinking and trying to think about everything and was thinking even of the fact when I got to 38 that I wanted to make sure that I was adjusted to where I would know where I was. But I didn't actually think about the crossing or about the train crossing.

(Mahoney Dep. at 123.) This deposition testimony is uncontradicted. The court finds that Mr. Mahoney was inattentive to the fact that he was approaching a railroad crossing as he approached the crossing and therefore was inattentive to the whistle or bell. n3 Applying the case law to these facts, the court finds that Mr. Mahoney's testimony that he does not recall hearing the whistle or bell lacks any probative value and is inadmissible. Plaintiffs' claim that Mr. Mahoney's inattentiveness goes to the weight of the evidence rather than its admissibility is not supported by any citation to legal authority and is at odds with the aforementioned authorities. *See, e.g., Bocock, 171 F.2d at 836* (holding witnesses' testimony that they did not hear the train's whistle did not create factual question as to whether **[*15]** the whistle was

sounded where evidence did not establish that witnesses were in proximity to hear the whistle or attentive to the whistle); *Pere Marquette Ry. Co., 29 F.2d at 479-80* (holding negative testimony that whistle and bell were not sounded by witnesses not in position to hear whistle and bell and not attentive to whether they were given did not create conflict in evidence with positive testimony of train crew that whistle and bell were sounded). Mr. Mahoney's testimony, therefore, fails to create a genuine issue as to whether the whistle or bell was sounded by the train crew.

> n3 Given this conclusion the court need not decide whether Mr. Mahoney, with his windows rolled up and radio, air conditioner, defroster and wipers on, was in a position to hear the train whistle.

Furthermore, it is noted that Mr. Mahoney has not testified that the train's whistle did not sound before the collision, only that he does not recall hearing it. Even assuming Mr. Mahoney had been attentive to the whistle **[*16]** or bell, his testimony would not create a genuine issue for trial. In *Pere Marquette Ry. Co. v. Anderson, 29 F.2d 479 (7th Cir. 1928),* it was alleged that a railway company was negligent in failing to sound the whistle and bell as statutorily required and that this negligence caused a collision with a motor vehicle. *Id. at 479.* A passenger on the train involved in the collision testified that he did not remember hearing the train whistle or bell. *Id.* In considering whether there was sufficient evidence for this negligence claim to reach the jury, the court stated that the passenger's testimony that "he did not remember hearing the signals may be disregarded entirely. ..." *Id. at 480; accord Callis v. Long Island R.R. Co., 372 F.2d 442, 444 (2nd Cir. 1967)* (per curiam) (concluding that witness's testimony that he had no recollection of hearing a whistle or bell had no probative value). Mr. Mahoney's lack of recollection as to whether the whistle or bell sounded before the accident does not create a conflict with the testimony of the train's crew that the whistle and bell were sounded in accordance with normal [*17] operating procedures.

Plaintiffs also offer Mr. Mahoney's testimony that he does not think it is possible that the train crew could have sounded the whistle and he did not hear it, as he can hear the whistle from his house which is two miles away. This testimony is entirely speculative and, therefore, fails to create a genuine issue as to whether the whistle was sounded. In *United States Steel Mining Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor, 187 F.3d 384 (4th Cir. 1999),* the plaintiff sought survivor's benefits under the Black Lung Benefits Act. The plaintiff offered the testimony of a doctor who speculated about the possible causes of the death of her husband. The doctor opined that: "it is *possible* that death could have occurred as a consequence of his [the husband's] pneumonia superimposed upon ... his occupational pneumoconiosis" and therefore "it can be stated that [his] occupational pneumoconiosis was a contributing factor to his death." *Id. at 390.* The court concluded that this testimony did not fulfill the plaintiff's burden of proving more-probably-than-not that her husband's death **[*18]** was because of pneumoconiosis. *Id.* The court explained:

> If a claimant ... had the burden of establishing that a traffic light was green his way, he would not satisfy his burden of proving that fact with testimony that "it is possible that it could" have been green his way. While it is possible it could have been green, it is also possible that it could have been red or yellow or even non-functioning. Because the testimony is entirely speculative, it does not advance the claimant's case.

Id The court added that "more importantly, the statement that it is possible that the light could have been green does not exclude, to any degree, the opposite proposition. Therefore, it cannot establish more likely than not that the light was green." *Id. at 390-91.* Likewise, Mr Mahoney's testimony that he does not think it is possible that the train crew could have sounded the whistle and he did not hear it is entirely speculative. Such testimony, consequently, does not create a genuine issue as to whether the whistle was sounded.

That leaves Plaintiffs with an affidavit of Mr. Scudder, executed on January 12, 2001, which they maintain creates an issue **[*19]** of fact regarding the sounding of the whistle. Mr. Scudder states in that affidavit: "I did not hear the train blow its whistle until after the impact had already occurred." (Scudder Aff., 1/12/ *01 P 5.)* Plaintiffs also rely on portions of a transcript of a tape recorded statement given by Mr. Scudder to Plaintiff's counsel, John F. Townsend, III, after the accident on June 17, 1999. At that time, Mr. Scudder was asked the following relevant questions and gave the following answers:

> Q. Could you ... tell me what [sic] you witnessed.
>
> A. ... I did not hear a whistle or anything like that. ...

Q. Ok. Did you hear the train blow a whistle?

A. I don't recall hearing the train whistle until after the impact.

(Scudder Aff. 1/12/01 PP 3-4 & Ex. A at 1-2.) However, in an affidavit executed by Mr. Scudder on July 3, 2000 and offered by Defendant, Mr. Scudder states that: "At the time of the accident, my radio was on and the defroster was turned on low, but I was still able to hear the train's whistle for about 5 to 10 seconds before the impact." (Scudder Aff. *7/3/ 00 P 6.)*

"'As a general rule, the law of this [the Seventh] **[*20]** circuit does not permit a party to create an issue of fact by submitting an affidavit whose conclusions contradict prior deposition or other sworn testimony.'" *Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1055 (7th Cir. 2000)* (quoting *Buckner v. Sam's Club, Inc., 75 F.3d 290, 292 (7th Cir. 1996)); see also Bank of Ill. v. Allied Signal Safety Restraint Sys., 75 F.3d 1162, 1171-72 (7th Cir. 1996); Adelman-Tremblay v. Jewel Cos., 859 F.2d 517, 520-21 (7th Cir. 1988)* (applying rule to non-party witnesses). An exception to this general rule arises when the witness offers a plausible explanation for the change in the sworn testimony, whether it be because the prior statement was mistaken, perhaps because of confusion or a lapse in memory, the subsequent statement is based on newly discovered evidence, or some other plausible reason. *See Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 406 n. 4 (7th Cir. 1998); Cowan v. Prudential Ins. Co. of Am., 141 F.3d 751, 756 (7th Cir. 1998); Bank of Ill., 75 F.3d at 1171-72; Russell v. Acme-Evans Co., 51 F.3d 64, 67-68 (7th Cir. 1995);* **[*21]** *Adelman-Tremblay, 859 F.2d at 520-21.*

Plaintiffs concede that there is "some conflict" between the Scudder affidavit offered by them and the Scudder affidavit offered by Defendant, but argue "these discrepancies" "go only to the weight of the evidence" (Pls.' Br. Resp. Def.'s Mot. Summ. J. n.1). The court finds that it is beyond dispute that the Scudder affidavit offered by Plaintiffs directly contradicts his prior sworn affidavit offered by Defendant. Thus, the question becomes whether Mr. Scudder has offered a plausible explanation for the change in his testimony about when he heard the train whistle.

Upon examining Plaintiffs' Surreply to Additional Material Facts n4 and Mr. Scudder's deposition testimony taken on February 8, 2001, the court finds that Mr. Scudder has not offered a plausible explanation for the change in his testimony. Mr. Scudder has given two tape recorded statements, signed two affidavits, and given a deposition in this case. The first tape recorded statement was given to Defendant's employee, a Mr. Spradlin on August 20, 1998, approximately 2 months after the accident at issue. (Scudder Dep. at 39, 50.) A few weeks after giving the statement **[*22]** to Mr. Spradlin, Mr. Scudder refreshed his recollection by going to the scene of the accident and remembered that he had not heard the train whistle until after the impact. (*Id.* at 46-49, 52.) Thereafter, on June 17, 1999, Mr. Scudder gave a tape recorded statement to Plaintiffs' counsel in which he stated that he did not hear the train whistle until after impact. (*Id.* at 38; Scudder Aff. 1/12/01, Ex. A at 1-2.)

n4 Though Defendant refers in its reply brief to some additional evidence relating to Mr. Scudder not previously offered by either party in the summary judgment briefing papers (*see* Def.'s Reply Br. at 4-6), it did not comply with Local Rule 56.1(d)(1) as it did not include such evidence in a Statement of Additional Evidence on Reply. Plaintiffs in an effort to comply with Local Rule 56.1 have designated certain evidence as their Surreply to Additional [Material] Facts, Nos. 41-46. The court may consider the matters placed in the record through Plaintiffs' Surreply and the submission of Mr. Scudder's deposition testimony.

[*23]

Subsequently, on July 3, 2000, he was asked by Defendant's counsel to execute an affidavit ("the July affidavit"), submitted by Defendant in support of its summary judgment motion, in which Mr. Scudder states that he heard the train whistle for 5 to 10 seconds before the impact. (Scudder Aff. *7/3/ 00 P 6.)* Defendant secured this July 3 affidavit based on the tape-recorded statement provided by Mr. Scudder to Mr. Spradlin in August 1998, in which Mr. Scudder said that he heard the whistle 5 to 10 seconds before impact. (Scudder Dep. at 50.) The July affidavit states: "I affirm under the penalty for perjury that the foregoing representations are true and correct." (Scudder Aff. 7/3/00 at 2.) The July affidavit does not reference the prior tape-recorded statement given by Mr. Scudder to Defendant.

After Mr. Scudder executed the wholly contradictory January 12, 2001, affidavit, he was deposed by Defendant. At his deposition, Mr. Scudder

testified that he did not believe that he heard the train's whistle 5 to 10 seconds before impact. (Scudder Dep. at 61-63.) He explained that he signed the July affidavit because he was "thinking that [the affidavit] was stating yes, that's **[*24]** the tape statement that I gave [Defendant] and that's what I said." (Scudder Dep. at 50; *see also id. at 58* ("I signed that [the July affidavit] because that's what I had stated on the tape, and I thought that's what I had to do because that's what it said on the tape, and I was signing it that yes, that's what I said on the tape."), 60 ("that's what I had said on the tape. I thought I was signing something that said this is what -- this is your recorded statement on the tape, and I thought that's what I was signing.")).

The July affidavit, however, was unambiguous on its face and simplistically clear. Nowhere on the affidavit does it state that Mr. Scudder believed the statements made therein to be true only on some date previous to July 3, let alone that he no longer believed those statements to be true. Rather, all indications from a fair reading of the affidavit indicate that Mr. Scudder's affidavit testimony was accurate as to the date the affidavit was executed. There is no reason to think from the face of the affidavit that Mr. Scudder could have misunderstood the meaning of the sworn to testimony. Nor does Mr. Scudder suggest in his deposition testimony **[*25]** that he was misled or tricked by Defense counsel as to the meaning of the statements contained within the July affidavit. Instead, Mr. Scudder's testimony indicates that he, without any help from Defendant's counsel, came to the conclusions he now stands by in attempting to explain his contradictory affidavits. Moreover, and troubling to the court, two days after Mr. Scudder executed the affidavit, Defendant's counsel sent Mr. Scudder a courtesy copy of the affidavit and a cover letter which stated in part:

> I enclose for your reference a copy of the affidavit which you signed on July 3, 2000. As you know, by executing the affidavit, you have sworn under penalty of perjury that all of the statements contained in the affidavit are true and correct.

(Scudder Dep. Ex. C.) At no time after receiving this letter did Mr. Scudder attempt to contact Defendant's counsel and explain his purported misunderstanding of the meaning of the affidavit. (Scudder Dep. at 37.) Mr. Scudder is an educated man. He received an associates degree in accounting from Ivy Tech in Anderson, Indiana, and is employed in the accounting field. (*Id. at 8-9.)* Had Mr. Scudder initially misunderstood **[*26]** the meaning of the July 3 affidavit, the simple and direct language of the July 5 letter surely would have caused him to question the accuracy or completeness of the testimony he so recently swore was true under the penalty of perjury.

The court finds that Mr. Scudder's testimony is insufficient to create a genuine issue of material fact as to whether the train crew sounded the whistle. Mr. Scudder's explanation for his contradictory testimony is simply not plausible. The court cannot sit idly by and refuse to act when a witness presents two sworn statements which are diametrically opposite to one another and then submits an explanation therefor which, in the court's opinion, simply does not hold water. Defendant's request to strike the affidavit of Mr. Scudder executed on January 12, 2001, is therefore **GRANTED** and Plaintiffs have no evidence on which they can survive summary judgment. n5

> n5 Because summary judgment is appropriate on Plaintiffs' negligence theory, the court need not address Defendant's comparative fault argument.

[*27]

II. Verified Motion To Strike Summary Judgment Surreply

Defendant moves to strike the surreply filed by Plaintiffs. Defendant does not object to the surreply in total, but rather, takes issue with the alleged "scandalous and impertinent accusations" contained therein. Those accusations are that: (1) defense counsel "misled" Mr. Scudder about the meaning of the July affidavit when presenting it to him, (Pls.' Surreply at 4); (2) Mr. Scudder "has been the unfortunate victim of overzealous work by the defense," (*id.*); (3) Mr. Scudder "was basically tricked into signing the affidavit for the defense," (*id.*); and (4) "the affidavit obtained by the defense was the result of defense counsel essentially lying to him about its meaning." (*Id.* at 5.)

The court has reviewed Mr. Scudder's deposition in its entirety and finds no statement by Mr. Scudder that he was "misled," victimized, "basically tricked" or lied to by defense counsel in connection with the July affidavit. Rather, Mr. Scudder testifies repeatedly that he misunderstood what he was signing by signing the July affidavit and believed he was merely acknowledging the prior statement given to Mr. Spradlin. Mr. Scudder's **[*28]** misunderstanding does not compel a conclusion that he was "misled," victimized, "tricked" or "lied to" by

defense counsel. These accusations made by Plaintiffs are serious indeed. Moreover, they imply unethical conduct by defense counsel and, thus, are scandalous. As the record presently before the court contains no evidentiary support for such accusations, they should be stricken from the surreply. Accordingly, Defendant's verified motion to strike Plaintiffs' summary judgment surreply is **GRANTED IN PART**: the surreply is not stricken in its entirety, but the four above quoted statements are ordered stricken. Plaintiffs' counsel is cautioned to be wary in the future of making such serious accusations in the absence of clear factual support for same.

III. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is **GRANTED**. Defendant's verified motion to strike Plaintiffs' surreply is also **GRANTED IN PART** as stated more fully above.

ALL OF WHICH IS ORDERED this 19th day of September 2001.

John Daniel Tinder, Judge

United States District Court